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and

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DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

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U.S. Customs Service

Treasury Decisions

19 CFR Parts 24, 159 and 174

(T.D. 00–32)

RIN 1515–AB76

INTEREST ON UNDERPAYMENTS AND OVERPAYMENTS OF CUSTOMS DUTIES, TAXES, FEES AND INTEREST

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document adopts as a final rule interim amendments to the Customs Regulations which conformed those regulations to existing statutory provisions and judicial precedent regarding the assessment of interest due to underpayments or overpayments to Customs of duties, taxes and fees pertaining to imported merchandise, including interest on those duties, taxes and fees. The majority of the conforming changes reflect the terms of section 505 of the Tariff Act of 1930, as amended by the Customs Modernization provisions of the North American Free Trade Agreement Implementation Act. The conforming amendments also reflect changes to 19 U.S.C. 1505 and to section 321 of the Tariff Act of 1930 (19 U.S.C. 1321) regarding interest that were made by the Miscellaneous Trade and Technical Corrections Act of 1996.

DATES: Final rule effective May 17, 2000.

FOR FURTHER INFORMATION CONTACT: Robert Reiley, Financial Management Division (202–927–1504).

SUPPLEMENTARY INFORMATION:

BACKGROUND

On October 20, 1999, Customs published T.D. 99–75 in the Federal Register (64 FR 56433) setting forth interim amendments to provisions within Parts 24, 159 and 174 of the Customs Regulations (19 CFR Parts 24, 159 and 174) to conform those regulations to existing statutory provisions and judicial precedent regarding the assessment of interest due

to underpayments or overpayments to Customs of duties, taxes and fees pertaining to imported merchandise, including interest on those duties, taxes and fees.

The majority of the conforming changes reflected the terms of section 505 of the Tariff Act of 1930 (19 U.S.C. 1505), as amended by section 642(a) within the Customs Modernization provisions of the North American Free Trade Agreement Implementation Act (Public Law 103–182, 107 Stat. 2057). Under that statute, interest accrues initially from the date the duties, taxes, fees and interest are deposited with Customs in the case of overpayments, or are required to be deposited with Customs in the case of underpayments, but in either case not beyond the date of liquidation or reliquidation of the applicable entry or reconciliation. Also under the statute and applicable judicial precedent, all bills issued by Customs for underpayments of duties, taxes, fees and interest are due within 15 or 30 days of issuance.

The conforming interim amendments also reflected other changes to 19 U.S.C. 1505 and to section 321 of the Tariff Act of 1930 (19 U.S.C. 1321) regarding interest that were made by sections 2(a) and 3(a)(12) of the Miscellaneous Trade and Technical Corrections Act of 1996 (Public Law 104–295, 110 Stat. 3514).

The interim regulatory amendments contained in T.D. 99–75 went into effect on October 20, 1999, and the notice prescribed a public comment period which closed on December 20, 1999. No comments were received during the prescribed public comment period. After further consideration, Customs has determined that the interim regulatory amendments should be adopted as a final rule without change.

EXECUTIVE ORDER 12866

This document does not meet the criteria for a "significant regulatory action" as specified in E.O. 12866.

REGULATORY FLEXIBILITY ACT

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that the amendments will not have a significant economic impact on a substantial number of small entities. The amendments conform the Customs Regulations to the terms of statutory provisions, and to the principles reflected in judicial decisions, that are currently in effect. In addition, in some cases, the amendments conform the regulatory provisions to longstanding Customs administrative procedures and practices that confer benefits on, or otherwise militate in favor of, the general public. Accordingly, the amendments are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

LIST OF SUBJECTS

19 CFR Part 24

Accounting, Claims, Customs duties and inspection, Interest, Taxes, User fees, Wages.

19 CFR Part 159

Computer technology, Customs duties and inspection, Entry, Imports, Liquidation.

19 CFR Part 174

Administrative practice and procedure, Customs duties and inspection, Protests.

AMENDMENTS TO THE REGULATIONS

For the reasons stated in the preamble, under the authority of 19 U.S.C. 66 and 1624 the interim rule amending 19 CFR Parts 24, 159 and 174 which was published at 64 FR 56433 on October 20, 1999, is adopted as a final rule without change.

RAYMOND W. KELLY,
Commissioner of Customs.

Approved: April 26, 2000.
JOHN P. SIMPSON,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, May 17, 2000 (65 FR 31261)]

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19 CFR Part 19

(T.D. 00–33)

RIN 1515–AC53

LOCATION OF DUTY-FREE STORES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to conform with the provisions of the Miscellaneous Trade and Technical Corrections Act of 1999 regarding the permissible location of a duty-free store. In addition to the existing permissible locations, a duty-free store that is an airport store as defined in the law may also be located in, or within 25 statute miles of, any staffed port of entry, whether or not it is the same port through which a purchaser at the store will depart from the Customs territory of the United States.

EFFECTIVE DATE: May 17, 2000.

FOR FURTHER INFORMATION CONTACT: William G. Rosoff, Duty and Refund Determination Branch, (202–927–2077).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Duty-free sales enterprises, also known as duty-free stores, are Customs bonded class 9 warehouses that operate under special procedures that allow merchandise to be offered for sale to departing travelers without payment of Customs duties and taxes, on condition that the merchandise they purchase will be exported by and with them from the Customs territory of the United States. The statutory authority under which duty-free stores operate is found in 19 U.S.C. 1555(b). The regulations that implement procedures for the administration of these facilities are contained in §§ 19.35 through 19.39 of the Customs Regulations (19 CFR 19.35–19.39).

The Miscellaneous Trade and Technical Corrections Act of 1999, Pub. L. 106–36, 113 Stat. 127 (June 25, 1999) (MTTCA), amended a number of Customs laws, including the provision relating to duty-free stores (19 U.S.C. 1555(b)). Specifically, section 2417 of the MTTCA amended section 1555(b) to expand upon the places where a duty-free store could properly be located in the United States.

LOCATION OF A DUTY-FREE STORE; PRIOR LAW

Section 1555(b) previously required that a duty-free store be located within the port of entry from which a purchaser of duty-free store merchandise departs from the Customs territory of the United States, or within 25 statute miles of the exit point from which the purchaser departs from the Customs territory. Section 19.35(b) repeats this requirement regarding the permissible location of a duty-free store.

LOCATION OF A DUTY-FREE STORE; AMENDED LAW

Section 2417 of the MTTCA amended 19 U.S.C. 1555(b) to allow a duty-free store to be located anywhere within a staffed, Customs-defined port of entry, or within 25 statute miles of a staffed port of entry, whether or not it is the same port through which a purchaser of duty-free store merchandise will depart from the Customs territory of the United States, provided that the purchaser will depart through an international airport located in the Customs territory (19 U.S.C. 1555(b)(2)(C)). As such, the duty-free store that is the subject of the amendment must be an airport store as defined in 19 U.S.C. 1555(b)(8)(A).

As is already the case under the law, the Customs Service, before authorizing a duty-free store at such a location, must conclude that reasonable assurance has been provided that merchandise purchased at the store will be exported from the Customs territory. To this end, a duty-free store that is an airport store must establish procedures that provide reasonable assurance that merchandise sold by the store will be exported from the Customs territory through an international airport located within the Customs territory (19 U.S.C. 1555(b)(2)(C), (3)(A) and (8)(A); 19 CFR 19.36(b); see also 19 CFR 19.36(f) and 19.39(c)).

The statutory amendment was intended to create additional opportunities for duty-free stores to increase sales by increasing the locations where international travelers departing from the United States may make duty-free store purchases.

Accordingly, § 9.35(b), Customs Regulations, is amended to conform to the statutory amendment by providing that an airport store may also be located within any staffed port of entry, or within 25 statute miles of a staffed port.

REGULATORY FLEXIBILITY ACT, EXECUTIVE ORDER 12866 AND INAPPLICABILITY OF PUBLIC NOTICE AND COMMENT AND DELAYED EFFECTIVE DATE REQUIREMENTS

Because the amendment in this final rule merely conforms the Customs Regulations to law, notice and public procedure are inapplicable and unnecessary pursuant to 5 U.S.C. 553(b)(B), and, pursuant to 5 U.S.C. 553(d)(3), a delayed effective date is not required. Because no notice of proposed rulemaking is required, it is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Nor does the amendment result in a "significant regulatory action" under E.O. 12866.

LIST OF SUBJECTS IN 19 CFR PART 19

Customs duties and inspection, Exports, Imports, Reporting and recordkeeping requirements, Warehouses.

AMENDMENT TO THE REGULATIONS

Part 19, Customs Regulations (19 CFR part 19), is amended as set forth below.

PART 19—CUSTOMS WAREHOUSES, CONTAINER STATIONS, AND CONTROL OF MERCHANDISE THEREIN

1. The general authority citation for part 19 and the relevant sectional authority citation continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States), 1624.

* * * * * * *

Sections 19.35–19.39 also issued under 19 U.S.C. 1555;

* * * * * * *

2. Section 19.35 is amended by revising paragraph (b) to read as follows:

§ 19.35 Establishment of duty-free stores (Class 9 warehouses).

* * * * * * *

(b) *Location.* A duty-free store (class 9 warehouse) may be established or located only:

(1) Within the same port of entry from which a purchaser of duty-free store merchandise departs the Customs territory;

(2) Within 25 statute miles from the exit point through which a purchaser of duty-free store merchandise departs the Customs territory; or

(3) In the case of an airport store, within any staffed port of entry, or within 25 statute miles from any staffed port of entry.

* * * * * * *

RAYMOND W. KELLY,
Commissioner of Customs.

Approved: March 30, 2000.

JOHN P. SIMPSON,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, May 17, 2000 (65 FR 31260)]

(T.D. 00–34)

19 CFR Part 122

REVISED LIST OF USER FEE AIRPORTS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations by revising the list of user fee airports in section 122.15(b), Customs Regulations. User fee airports are those which, while not qualifying for designation as international or landing rights airports because of insufficient volume or value of business, have been approved by the Commissioner of Customs to receive the services of Customs officers on a fee basis for the processing of aircraft entering the United States and their passengers and cargo.

EFFECTIVE DATE: May 17, 2000.

FOR FURTHER INFORMATION CONTACT: Betsy Passuth, Office of Field Operations, 202–927–0795.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Part 122, Customs Regulations (19 CFR Part 122), sets forth regulations relating to the entry and clearance of aircraft in international commerce and the transportation of persons and cargo by aircraft in international commerce.

Under § 1644a, Title 19, United States Code (19 U.S.C. 1644a), the Secretary of the Treasury is authorized to designate places in the United States as ports of entry for civil aircraft arriving from any place outside of the United States, and for merchandise carried on the air-

craft. These airports are referred to as international airports, and the location and name of each are listed in § 122.13, Customs Regulations (19 CFR 122.13). In accordance with §122.33, Customs Regulations (19 CFR 122.33), the first landing of every civil aircraft entering the United States from a foreign area must be at one of these international airports, unless the aircraft has been specifically exempted from this requirement or permission to land elsewhere has been granted. Customs officers are assigned to all international airports to accept entries of merchandise, collect duties and enforce the customs laws and regulations.

Other than making an emergency or forced landing, if a civil aircraft desires to land at an airport not designated by Customs as an international airport, the pilot may request permission to land at a specific airport and, if granted, Customs assigns personnel to that airport for the aircraft. The airport where the aircraft is permitted to land is called a landing rights airport (19 CFR 122.24).

Section 236 of Pub. L. 98–573 (the Trade and Tariff Act of 1984), codified at 19 United States Code 58b (19 U.S.C. 58b), creates an option for civil aircraft desiring to land at an airport other than an international or landing rights airport. A civil aircraft arriving from a place outside the United States may ask Customs for permission to land at an airport designated by the Secretary of the Treasury as a user fee airport.

Pursuant to 19 U.S.C. 58b, an airport may be designated as a user fee airport if the Secretary of the Treasury determines that the volume of Customs business at the airport is insufficient to justify the availability of Customs services at the airport and the governor of the State in which the airport is located approves the designation. Generally, the type of airport that would seek designation as a user fee airport would be one at which a company, such as an air courier service, has a specialized interest in regularly landing.

Inasmuch as the volume of business anticipated at these airports is insufficient to justify their designation as an international or landing rights airport, the availability of Customs services is not paid for out of Customs appropriations from the general treasury of the United States. Instead, the services of Customs officers are provided on a fully reimbursable basis to be paid for by the user fee airports on behalf of the recipients of the services.

The fees which are to be charged at user fee airports, according to the statute, shall by paid by each person using Customs services at the airport and shall be in the amount equal to the expenses incurred by the Secretary of the Treasury in providing Customs services that are rendered to such persons at such airport, including the salary and expenses of those employed by the Secretary of the Treasury to provide the Customs services. To implement this provision, the airport seeking the designation as a user fee airport or that airport's authority agrees to pay Customs a flat fee annually and the users of the airport are to reimburse that airport/airport authority. The airport/airport authority agrees to

set and periodically review its charges to ensure that they are in accord with the airport's expenses.

Pursuant to Treasury Department Order No. 165, Revised (Treasury Decision 53564), all the rights, privileges, powers, and duties vested in the Secretary of the Treasury by the Tariff Act of 1930, as amended, by the navigation laws, or by any other laws administered by Customs are transferred to the Commissioner of Customs. Accordingly, the authority granted to the Secretary of the Treasury to designate user fee airports and to determine appropriate fees is delegated to the Commissioner of Customs.

Under this authority, Customs has determined that certain conditions must be met before an airport can be designated as a user fee airport. At least one full-time Customs officer must be requested, and the airport must be responsible for providing Customs with satisfactory office space, equipment and supplies, at no cost to the Federal Government.

In § 122.15(b), Customs Regulations (19 CFR 122.15(b)), Customs sets forth a list of the user fee airports designated by the Commissioner of Customs in accordance with 19 U.S.C. 58b. This document updates the list.

Inapplicability of Public Notice and Delayed Effective Date Requirements

Because this amendment merely lists those user fee airports designated by the Commissioner of Customs in accordance with 19 U.S.C. 58b and neither imposes additional burdens on, nor takes away any existing rights or privileges from, the public, pursuant to 5 U.S.C. 553(b)(B), notice and public procedure are unnecessary, and for the same reasons, pursuant to 5 U.S.C. 553(d)(3), a delayed effective date is not required.

Regulatory Flexibility Act and Executive Order 12866

Because no notice of proposed rulemaking is required, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.)* do not apply. This amendment does not meet the criteria for a "significant regulatory action" as specified in Executive Order 12866.

Drafting Information

The principal author of this document was Janet L. Johnson, Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

List of Subjects in 19 CFR Part 122

Air carriers, Aircraft, Airports, Customs duties and inspection, Freight.

Amendments to the Regulations

Part 122, Customs Regulations (19 CFR Part 122) is amended as set forth below:

PART 122—AIR COMMERCE REGULATIONS

1. The authority citation for Part 122, Customs Regulations, continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 58b, 66, 1433, 1436, 1448, 1459, 1590, 1594, 1623, 1624, 1644, 1644a.

2. Section 122.15(b) is amended by revising the list of airports to read as follows:

§ 122.15 User fee airports.

* * * * * * *

(b) *List of user fee airports.* * * *

Location	*Name*
Addison, Texas	Addison Airport
Blountville, Tennessee	Tri-City Regional Airport
Blytheville, Arkansas	Arkansas Aeroplex
Broomfield, Colorado	Jefferson County Airport
Daytona Beach, Florida	Daytona Beach International Airport
Decatur, Indiana	Decatur Airport
Dublin, Virginia	New River Valley Airport
Egg Harbor Township, New Jersey	Atlantic City International Airport
Englewood, Colorado	Centennial Airport
Fargo, North Dakota	Hector International Airport
Fort Wayne, Indiana	Baer Field Airport
Fort Worth, Texas	Fort Worth Alliance Airport
Johnson City, New York	Binghamton Regional Airport
Lexington, Kentucky	Blue Grass Airport
Manchester, New Hampshire	Manchester Airport
Medford, Oregon	Rogue Valley International Airport
Melbourne, Florida	Melbourne Airport
Midland, Texas	Midland International Airport
Morristown, New Jersey	Morristown Municipal Airport
Moses Lake, Washington	Port of Moses Lake
Myrtle Beach, South Carolina	Myrtle Beach International Airport
Ocala, Florida	Ocala Regional Airport
Palm Springs, California	Palm Springs International Airport
Rochester, Minnesota	Rochester Airport
San Bernardino, California	San Bernardino International Airport
Sarasota, Florida	Sarasota/Bradenton International Airport
Scottsdale, Arizona	Scottsdale Airport
Terre Haute, Indiana	Hulman Regional Airport
Victorville, California	Southern California Logistics Airport
Waterford, Michigan	Oakland International Airport
Waukegan, Illinois	Waukegan Regional Airport
West Chicago, Illinois	Dupage County Airport
West Trenton, New Jersey	Trenton Mercer Airport

Location	*Name*
Wheeling, Illinois	Palwaukee Airport
Wilmington, Ohio	Wilmington Airport
Ypsilanti, Michigan	Willow Run Airport

* * * * * * *

RAYMOND W. KELLY,
Commissioner of Customs.

Approved: March 30, 2000.
JOHN P. SIMPSON,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, May 17, 2000 (65 FR 31263)]

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19 CFR Part 101

(T.D. 00–35)

EXTENSION OF PORT LIMITS OF PUGET SOUND, WASHINGTON

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations pertaining to the field organization of Customs by extending the geographical limits of the consolidated port of Puget Sound, Washington. This change is being made as part of Customs continuing program to obtain more efficient use of its personnel, facilities and resources and to provide better service to carriers, importers and the general public.

EFFECTIVE DATE: June 16, 2000.

FOR FURTHER INFORMATION CONTACT: Betsy Passuth, Office of Field Operations, Mission Support Service, 202–927–0795.

SUPPLEMENTARY INFORMATION:

BACKGROUND

A Notice of Proposed Rulemaking was published in the Federal Register (64 FR 61232) of November 10, 1999, which proposed to extend the geographical limits of the consolidated port of Puget Sound by extending and redefining the boundaries of Tacoma.

The description of Tacoma within the description of the Puget Sound port was proposed to be extended to include two industrial parks which have new facilities for clearing, storing and forwarding imported merchandise and require the services of Customs personnel.

ANALYSIS OF COMMENT

One comment was received in response to the proposal. This comment strongly supported the proposal to extend and redefine the boundaries of the port of Puget Sound, Washington.

CONCLUSION

In light of the favorable comment received and after further consideration of the matter, Customs has decided to proceed with the extension of the geographical limits of the port of Puget Sound, Washington.

NEW PORT LIMITS

As amended, the geographical area within the boundaries of the consolidated port of Puget Sound is as follows:

The ports of Seattle (Section 35, Township 27 North, Range 3 East, West Meridian, County of Snohomish, and the geographical area beginning at the intersection of N.W. 205th Street and the waters of Puget Sound, proceeding in an easterly direction along the King County line to its intersection with 100th Avenue N.E., thence southerly along 100th Avenue N.E. and its continuation to the intersection of 100th Avenue S.E. and S.E. 240th Street, thence westerly along S.E. 240th Street, to its intersection with North Central Avenue, thence southerly along North Central Avenue, its continuation as South Central Avenue and 83rd Avenue South and its connection to Auburn Way North, thence southerly along Auburn Way North and its continuation as Auburn Way South to its intersection with State Highway 18, thence westerly along Highway 18 to its intersection with A Street S.E., then southerly along A Street S.E. to its intersection with the King County Line, then westerly along the King County Line to its intersection with the waters of Puget Sound and then northerly along the shores of Puget Sound to its intersection with N.W. 205th Street, the point of beginning, all within the County of King, State of Washington), Anacortes, Bellingham, Everett, Friday Harbor, Neah Bay, Olympia, Port Angeles, Port Townsend, and the territory in Tacoma, beginning at the intersection of the westernmost city limits of Steilacoom and The Narrows and proceeding easterly along Main Street to the intersection of Stevens Street, then southerly along Stevens Street to the intersection of Washington Boulevard, then easterly along Washington Boulevard to the intersection of Gravely Lake Drive S.W., then southeasterly to the intersection of Nyanza Road, SW, then southerly to its intersection with Pacific Highway (U.S. Route 99), then proceeding in a northeasterly direction along Pacific Highway to its intersection with 112 Street East and continuing in an easterly direction along 112 Street East to its intersection with the northwest corner of McChord Air Force Base, then proceeding along the northern, then western, then southern boundary of McChord Air Force Base to its intersection, just west of Lake Mondress, with the northern boundary of the Fort Lewis Military Reservation, then proceeding in an easterly direction along the northern boundary of the Fort Lewis Military Reservation to its intersection with Pacific Avenue

(SR–7), then proceeding in a southerly direction along Pacific Avenue (SR–7) to its intersection with SR–507, then proceeding in a southeasterly direction along SR–7 to its intersection with 224th Street East, then proceeding in an easterly direction along 224th Street East to its intersection with Meridian Street South (SR–161), then proceeding in a northerly direction along Meridian Street South (SR–161) to the intersection with 176 Street East, then easterly along 176 Street East extended to the intersection with Sunrise Parkway East, then northwesterly along Sunrise Parkway East to the intersection with 122nd Avenue East, then northerly to the intersection with Old Military Road East, then northeasterly to the intersection with SR–162, then northerly along SR–162 to the intersection with SR–410, then easterly along SR–410 to the intersection with 166th Avenue East, then northerly to the intersection with Sumner-Tapps Highway, continuing northeasterly along Sumner-Tapps Highway to 16th Street East, then easterly to 182 Avenue East, then northerly to the northern boundary of Pierce County, then proceeding in a westerly direction along the northern boundary of Pierce County to its intersection with Puget Sound, then proceeding in a generally southwesterly direction along the banks of the East Passage of Puget Sound, Commencement Bay, and The Narrows to the point of intersection with the westernmost city limits of Steilacoom, Washington, including all points and places on the southern boundary of the Juan de Fuca Strait from the eastern port limits of Neah Bay to the western port limits of Port Townsend, all points and places on the western boundary of Puget Sound, including Hood Canal, from the port limits of Port Townsend to the northern port limits of Olympia, all points and places on the southern boundary of Puget Sound from the port limits of Olympia to the western port limits of Tacoma, and all points and places on the eastern boundary of Puget Sound and contiguous waters from the port limits of Tacoma north to the southern port limits of Bellingham, all in the State of Washington.

AUTHORITY

This change is being made under the authority of 5 U.S.C. 301 and 19 U.S.C. 2, 66 and 1624.

REGULATORY FLEXIBILITY ACT AND EXECUTIVE ORDER 12866

Customs establishes, expands and consolidates Customs ports of entry throughout the United States to accommodate the volume of Customs-related activity in various parts of the country. Although a notice was issued for public comment on this subject matter, because this document relates to agency management and organization, it is not subject to the notice and procedure requirements of 5 U.S.C. 553. Accordingly, this document is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Agency organization matters such as this port extension are not subject to Executive Order 12866.

DRAFTING INFORMATION

The principal author of this document was Janet L. Johnson, Regulations Branch. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 101

Customs duties and inspection, Exports, Imports, Organization and functions (Government agencies).

AMENDMENT TO THE REGULATIONS

For the reasons set forth above, part 101 of the Customs Regulations is amended as set forth below.

PART 101—GENERAL PROVISIONS

1. The general authority citation for part 101 and the specific authority citation for § 101.3 continue to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 2, 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States), 1623, 1624, 1646a.

Sections 101.3 and 101.4 also issued under 19 U.S.C. 1 and 58b.

* * * * * * *

2. In the list of ports in § 101.3(b)(1), under the state of Washington, the "Limits of port" column adjacent to "Puget Sound" in the "Ports of entry" column is amended by removing the reference "T.D. 96–63" and adding in its place "T.D. 00–35".

RAYMOND W. KELLY,
Commissioner of Customs.

Approved: March 30, 2000.

JOHN P. SIMPSON,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, May 17, 2000 (65 FR 31262)]

19 CFR Part 12

(T.D. 00–36)

RIN 1515–AC62

ENTRY OF SOFTWOOD LUMBER SHIPMENTS FROM CANADA

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Interim regulations; solicitation of comments.

SUMMARY: This document adopts on an interim basis an amendment to the provision within the Customs Regulations that sets forth entry requirements for shipments of softwood lumber from Canada under the agreement between the Governments of the United States and Canada regarding trade in softwood lumber. This interim amendment implements an amendment to the softwood lumber agreement involving the addition of two export fee payment status categories (permit type codes) covering softwood lumber from the Canadian province of British Columbia.

DATES:

Effective Date: Interim rule effective May 23, 2000.
Comment: Comments must be submitted by July 24, 2000.

ADDRESSES: Written comments may be addressed to, and inspected at, the Regulations Branch, U.S. Customs Service, 1300 Pennsylvania Avenue, N.W., 3rd Floor, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Dixie Staple, Office of Field Operations (202–927–1131).

SUPPLEMENTARY INFORMATION:

BACKGROUND

This document amends the Customs Regulations on an interim basis to reflect an amendment of the agreement between the Governments of the United States and Canada regarding trade in softwood lumber. The amendment involves the addition of two export fee payment status categories (permit type codes) covering softwood lumber from the Canadian province of British Columbia.

Adoption of the Softwood Lumber Agreement

On May 29, 1996, the United States entered into the Softwood Lumber Agreement (the Agreement) with Canada under the authority of section 301(c)(1)(D) of the Trade Act of 1974, as amended (19 U.S.C. 2411(c)(1)(D)), which authorizes the United States Trade Representative (the USTR) to "enter into binding agreements" with a foreign country that commit the foreign country to, among other things, eliminate any burden or restriction on U.S. commerce resulting from an act,

policy or practice of the foreign country. The Agreement, which went into effect on April 1, 1996, was specifically intended to provide a satisfactory resolution to certain acts, policies and practices of the Government of Canada affecting exports to the United States of softwood lumber which had been the subject of an investigation initiated by the USTR under section 302(b)(1)(A) of the Trade Act of 1974, as amended (19 U.S.C. 2412(b)(1)(A)), and which on October 4, 1991, pursuant to section 304(a) of the Trade Act of 1974, as amended (19 U.S.C. 2414(a)), had been found by the USTR to be unreasonable and to burden or restrict U.S. commerce. The Agreement was the product of a consultative process established by the United States and Canada and involving the participation of the U.S. Government, Canadian federal and provincial governments and, where appropriate, industries and other interested parties in both countries.

The Agreement refers specifically to softwood lumber mill products classified in subheadings 4407.10.00, 4409.10.10, 4409.10.20, and 4409.10.90 of the Harmonized Tariff Schedule of the United States (HTSUS) that were "first manufactured" into a product of one of those HTSUS subheadings in the Canadian provinces of Ontario, Quebec, British Columbia or Alberta. The Agreement requires that Canada assess fees on exports of that softwood lumber in each of the five years following April 1, 1996, based on the following schedule: (1) for total shipments up to 14.7 billion board feet, free (no fee); (2) for any amount shipped in excess of 14.7 billion board feet but not in excess of 15.35 billion board feet, US$50 per thousand board feet in the first year and with annual adjustments for inflation in subsequent years; and (3) for any amount shipped in excess of 15.35 billion board feet, US$100 per thousand board feet and with annual adjustments for inflation in subsequent years. The Agreement also allows an additional amount of exports of such softwood lumber in excess of 14.7 billion board feet without the payment of a fee if the average price of a benchmark softwood lumber price exceeds a prescribed "trigger price" during any quarterly period. In order to control and monitor exports of softwood lumber first manufactured in Ontario, Quebec, British Columbia and Alberta, the Agreement provides that Canada will issue an export permit for each shipment of such softwood lumber and that Canada will collect any required fee for amounts of lumber exported in excess of 14.7 billion board feet upon issuance of the export permit.

The Agreement requires the collection of information by Canada in connection with the issuance of export permits for softwood lumber first manufactured in Ontario, Quebec, British Columbia and Alberta and the collection of information by the United States in connection with import transactions involving that lumber.

With regard to the import end, the Agreement obligates the United States to require that the U.S. importer provide specific information in connection with the entry of the lumber under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484). The information required to

be collected under the Agreement includes the following three specific data elements which were not previously required under the Customs laws and regulations, the last two of which were required by the Agreement to be collected as soon as practicable after the entry into force of the Agreement: (1) the province of first manufacture of the lumber; (2) the export permit number issued in Canada for the shipment; and (3) the fee status of the lumber for which the export permit was issued (whether the lumber in the shipment was attributed to a quantity to which no fee applies or to a quantity that is subject to the US$50 fee or to a quantity that is subject to the US$100 fee or to a quantity that is covered by the trigger price mechanism).

Implementing regulations

On February 26, 1997, Customs published in the Federal Register (62 FR 8620) T.D. 97–6 which set forth interim amendments to the Customs Regulations to provide an appropriate regulatory context for the new requirements resulting from the Agreement as described above. Those amendments included the adoption of a new § 12.140 (19 CFR 12.140) which specifically addresses the entry requirements for softwood lumber under the agreement. Paragraph (b) of § 12.140 prescribes the information to be included on the entry summary and requires, under subparagraph (b)(2)(ii), an indication of the export fee payment status of the product for which the permit was issued according to one of four categories, Category A through Category D.

Amendment of the Agreement

On June 1, 1998, the British Columbia Forest Ministry reduced stumpage (timber harvesting) fees charged on all timber grown on provincially-owned lands, which accounts for the overwhelming majority of timber harvested in the province. The United States considered this reduction to be a violation of the Agreement and therefore invoked the dispute settlement provisions of the Agreement. When consultations failed to resolve the dispute, an Arbitration Panel was formed, Canada and the United States made submissions to the Arbitration Panel, and oral hearings were held. The dispute was ultimately settled, without issuance of a decision by the Arbitration Panel, on August 26, 1999, by an exchange of letters between the Governments of Canada and the United States which amended the Agreement and terminated the dispute.

The August 26, 1999, settlement and amendment of the Agreement applies only to softwood lumber first manufactured in British Columbia and applies only in the fourth and fifth years of the Agreement. The effect of the settlement and amended Agreement is to require Canada (1) to impose the higher of the two basic export fee levels called for under the Agreement ($100 per thousand board feet with annual adjustments for inflation after the first year) at lower lumber export levels for the province than previously was the case and (2) to impose a new, higher fee on lumber exports when they exceed recent average annual ship-

ments to the United States from the province. Specifically, under the terms of the settlement and amended Agreement:

1. In the fourth year (April 1, 1999–March 31, 2000):

a. Ninety million board feet of the 362.3 million board feet lower fee base (LFB) allocation to British Columbia companies in that year will be re-priced at the current upper fee base (UFB) fee level (that is, US$105.86 per thousand board feet which represents the adjusted $100 fee applicable during the fourth year), and Canada will collect a fee equivalent to that UFB fee level on the issuance of a permit for export of the softwood lumber to the United States ("re-priced LFB"); and

b. Canada will collect a fee on the issuance of a permit for export to the United States of quantities of UFB by British Columbia companies (which includes re-priced LFB described in paragraph 1.a. above) in excess of 110 million board feet (the average of the UFB shipments for the first and second years of the Agreement) at the fee level of US$146.25 per thousand board feet (US$105.86 per thousand board feet plus US$40.39 per thousand board feet) ("re-priced UFB");

2. In the fifth year (April 1, 2000–March 31, 2001):

a. Either 90 million board feet, or any amount in excess of 272 million board feet, whichever is greater, of LFB allocations to British Columbia companies in that year will be re-priced at the current UFB level, and Canada will collect a fee equivalent to that UFB fee level on the issuance of a permit for export of the softwood lumber to the United States ("re-priced LFB"); and

b. Canada will collect a fee on the issuance of a permit for export to the United States of quantities of UFB by British Columbia companies (which includes re-priced LFB described in paragraph 2.a. above) in excess of 110 million board feet (the average of the UFB shipments for the first and second years of the Agreement) at the fee level of US$40.39 above the current UFB rate ("re-priced UFB"); and

3. If any portion of LFB lumber allocated to a British Columbia company which has been re-priced pursuant to paragraph 1.a. or paragraph 2.a. above is transferred to a company in another Canadian province or is returned for temporary reallocation, Canada will collect a fee equivalent to the current UFB level on the issuance of a permit for export of the softwood lumber to the United States.

Customs has determined that the portion of § 12.140 that sets forth the various export fee payment statuses to be included on entry summaries must be amended in order to accommodate the new statuses that apply to softwood lumber first manufactured in British Columbia under the settlement and amended Agreement discussed above. In this regard, Customs has been advised by the Government of Canada that the new fee payment status categories (permit type codes) that Canada will assign to the subject British Columbia exports are "R" for re-priced LFB (that is, the products described in paragraphs 1.a. and 2.a. above)

and "S" for re-priced UFB (that is, the products described in paragraphs 1.b. and 2.b. above).

Accordingly, this document amends the reporting requirement provisions within § 12.140(b) on an interim basis by adding two new subparagraphs (b)(2)(ii)(E) and (b)(2)(ii)(F) to cover the new "R" and "S" fee payment status categories applicable to British Columbia exports. It should be noted that no reference is made in the new regulatory text to transfers or reallocations (paragraph 3. above) because exports involving transfers and reallocations would be reported as having the category C export fee payment status (that is, UFB) already specified in subparagraph (b)(2)(ii)(C).

COMMENTS

Before adopting this interim regulation as a final rule, consideration will be given to any written comments timely submitted to Customs, including comments on the clarity of this interim rule and how it may be made easier to understand. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9 a.m. and 4:30 p.m. at the Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service, 1300 Pennsylvania Avenue, N.W., 3rd Floor, Washington, DC.

INAPPLICABILITY OF NOTICE AND DELAYED EFFECTIVE DATE REQUIREMENTS, THE REGULATORY FLEXIBILITY ACT, AND EXECUTIVE ORDER 12866

Pursuant to the provisions of 5 U.S.C. 553(a), public notice is inapplicable to this interim regulation because it is within the foreign affairs function of the United States. The collection of information provided for in this interim regulation is required under the terms of the amended Softwood Lumber Agreement with Canada and is necessary to ensure effective monitoring of the operation of that Agreement. Furthermore, for the same reasons and because the collection of this information must begin as soon as practicable, it is determined that good cause exists under the provisions of 5 U.S.C. 553(d)(3) for dispensing with a delayed effective date. Because no notice of proposed rulemaking is required for interim regulations, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.)* do not apply; and because this document involves a foreign affairs function of the United States and implements an international agreement, it is not subject to the provisions of E.O. 12866.

PAPERWORK REDUCTION ACT

The collections of information in the current regulations have already been approved by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507) and assigned OMB control number 1515–0065 (Entry summary and continuation sheet). This rule does not involve any material change to the existing approved information collection.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number assigned by OMB.

LIST OF SUBJECTS IN 19 CFR PART 12

Bonds, Canada, Customs duties and inspection, Entry of merchandise, Imports, Prohibited merchandise, Reporting and recordkeeping requirements, Restricted merchandise, Trade agreements.

AMENDMENT TO THE REGULATIONS

For the reasons set forth in the preamble, Part 12, Customs Regulations (19 CFR Part 12), is amended as set forth below.

PART 12—SPECIAL CLASSES OF MERCHANDISE

1. The authority citation for Part 12 continues to read in part as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States (HTSUS)), 1624;

* * * * * * *

Section 12.140 also issued under 19 U.S.C. 1484, 2416(a), 2171;

* * * * * * *

2. In § 12.140:

a. Paragraph (b)(2)(ii)(C) is amended by removing the word "or" at the end;

b. Paragraph (b)(2)(ii)(D) is amended by removing the period at the end and adding, in its place, a semicolon; and

c. New paragraphs (b)(2)(ii)(E) and (b)(2)(ii)(F) are added to read as follows:

§ 12.140 Entry of softwood lumber from Canada.

* * * * * * *

(b) * * *

* * * * * * *

(2) * * *

(ii) * * *

(E) Category R: Payment of the re-priced lower fee base export fee applicable to certain products first manufactured in British Columbia; or

(F) Category S: Payment of the re-priced upper fee base export fee applicable to certain products first manufactured in British Columbia.

* * * * * * *

RAYMOND W. KELLY,
Commissioner of Customs.

Approved: April 18, 2000.

JOHN P. SIMPSON,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, May 23, 2000 (65 FR 33251)]

19 CFR Part 162

(T.D. 00–37)

RIN 1515–AC60

SUMMARY FORFEITURE OF CONTROLLED SUBSTANCES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to reflect an amendment to 21 U.S.C. 881 made by the Anti-Drug Abuse Act of 1986. The statutory amendment added Schedule II controlled substances to the Schedule I controlled substances already subject to summary forfeiture and destruction under subsection (f) of 21 U.S.C. 881. The amendment set forth in this document brings the Customs Regulations into conformance with the statute.

EFFECTIVE DATE: May 23, 2000.

FOR FURTHER INFORMATION CONTACT: Todd Schneider, Office of Regulations and Rulings (202–927–1694).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Subsection (a)(1) of 21 U.S.C. 881 provides that all controlled substances that have been manufactured, distributed, dispensed or acquired in violation of subchapter 1, chapter 13, title 21, United States Code, are subject to forfeiture to the United States and no property right shall exist in them. Subsection (f) of 21 U.S.C. 881 provides that all controlled substances in Schedule I and Schedule II will be deemed contraband, seized and summarily forfeited to the United States if they are possessed, transferred, sold or offered for sale in violation of the subchapter. Also, subsection (f) provides that all substances in Schedule I and Schedule II that are seized or come into the possession of the United States, the owners of which are unknown, will be deemed contraband and summarily forfeited to the United States.

Prior to 1986, 21 U.S.C. 881(f) applied only to Schedule I controlled substances. Section 1006(c)(1) of the Anti-Drug Abuse Act of 1986 (Pub. L. 99–570, 100 Stat. 3207, October 27, 1986) amended 21 U.S.C. 881(f) to include Schedule II controlled substances.

Section 162.45a of the Customs Regulations (19 C.F.R. 162.45a), which implements the seizure and summary forfeiture procedure of 21 U.S.C. 881(f), does not reflect the current statute in that it only discusses Schedule I controlled substances (as defined in 21 U.S.C. 802(6) and 812). Accordingly, § 162.45a is amended in this document to include Schedule II controlled substances. This document also makes conforming changes to §§ 162.45(b) and 162.63.

INAPPLICABILITY OF PUBLIC NOTICE AND COMMENT AND DELAYED EFFECTIVE DATE REQUIREMENTS

Pursuant to the provisions of 5 U.S.C. 553(b)(B), Customs has determined that notice and public procedures for this regulation are unnecessary. The regulatory change in this document conforms the Customs Regulations to the terms of a law that is already in effect. For the same reasons, pursuant to the provisions of 5 U.S.C. 553(d)(1) and (3), Customs finds that there is good cause for dispensing with a delayed effective date.

EXECUTIVE ORDER 12866

This document does not meet the criteria for a "significant regulatory action" as specified in E.O. 12866.

REGULATORY FLEXIBILITY ACT

Because no notice of proposed rulemaking is required for this rule, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.)* do not apply.

DRAFTING INFORMATION

The principal author of this document was Bill Conrad, Office of Regulations and Rulings, U.S. Customs Service.

LIST OF SUBJECTS IN 19 CFR PART 162

Administrative practice and procedure, Drug traffic control, Imports, Inspection, Law Enforcement, Penalties, Prohibited merchandise, Seizures and forfeitures.

AMENDMENT TO THE REGULATIONS

For the reasons stated in the preamble, part 162 of the Customs Regulations (19 CFR Part 162) is amended as set forth below.

PART 162—INSPECTION, SEARCH, AND SEIZURE

1. The authority citation for part 162 continues to read in part, and a new authority citation for § 162.45a is added to read, as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1592, 1593a, 1624.

* * * * * * *

Section 162.45a also issued under 21 U.S.C. 881;

* * * * * * *

2. Section 162.45 is amended by revising the section heading, amending the first sentence of paragraph (b)(1), and revising paragraph (b)(2), to read as follows:

§ 162.45 Summary forfeiture: Property other than Schedule I and Schedule II controlled substances. Notice of seizure and sale.

* * * * * * *

(b) *Publication.* (1) If the appraised value of any property in one seizure from one person, other than Schedule I and Schedule II controlled

substances (as defined in 21 U.S.C. 802(6) and 812), exceeds $2,500, the notice will be published for at least three successive weeks in a newspaper circulated at the Customs port and in the judicial district where the property was seized. * * *

(2) In all other cases, except for Schedule I and Schedule II controlled substances (see § 162.45a), the notice will be published by posting it in the customhouse nearest the place of seizure. It will be posted in a conspicuous place that is accessible to the public, with the date of posting noted thereon, and will be kept posted for at least three successive weeks. Articles of small value of the same class or kind included in two or more seizures will be advertised as one unit.

* * * * * * *

3. The heading and text of § 162.45a is revised to read as follows:

§ 162.45a Summary forfeiture of Schedule I and Schedule II controlled substances.

The Controlled Substances Act (84 Stat. 1242, 21 U.S.C. 801 *et seq.*) provides that all controlled substances in Schedule I and Schedule II (as defined in 21 U.S.C. 802(6) and 812) that are possessed, transferred, sold or offered for sale in violation of the Act will be deemed contraband, seized and summarily forfeited to the United States (21 U.S.C. 881(f)). The Controlled Substances Import and Export Act (21 U.S.C. 951 *et seq.)* incorporates by reference this contraband forfeiture provision of 21 U.S.C. 881. See 21 U.S.C. 965. Accordingly, in the case of a seizure of Schedule I or Schedule II controlled substances, the Fines, Penalties, and Forfeitures Officer or his designee will contact the appropriate Drug Enforcement Administration official responsible for issuing permits authorizing the importation of such substances (see 21 CFR part 1312). If upon inquiry the Fines, Penalties, and Forfeitures Officer or his designee is notified that no permit for lawful importation has been issued, he will declare the seized substances contraband and forfeited pursuant to 21 U.S.C. 881(f). Inasmuch as such substances are Schedule I and Schedule II controlled substances, the notice procedures set forth in § 162.45 are inapplicable. When seized controlled substances are required as evidence in a court proceeding, they will be preserved to the extent and in the quantities necessary for that purpose.

4. Section 162.63 is revised to read as follows:

§ 162.63 Arrests and seizures.

Arrests and seizures under the Controlled Substances Act (84 Stat. 1242, 21 U.S.C. 801 *et seq.*), and the Controlled Substances Import and Export Act (84 Stat. 1285, 21 U.S.C. 951 *et seq.*), will be handled in the same manner as other Customs arrests and seizures. However, Schedule I and Schedule II controlled substances (as defined in 21 U.S.C. 802(6) and 812) imported contrary to law will be seized and forfeited in

the manner provided in the Controlled Substances Act (21 U.S.C. 881(f)). See § 162.45a.

RAYMOND W. KELLY,
Commissioner of Customs.

Approved: March 24, 2000.
JOHN P. SIMPSON,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, May 23, 2000 (65 FR 33254)]

(T.D. 00–38)

BONDS

APPROVAL TO USE AUTHORIZED FACSIMILE SIGNATURES AND SEALS

The use of facsimile signatures and seals on Customs bonds by the following corporate surety has been approved effective this date:

Great American Insurance Company
Authorized facsimile signature on file for:
Kevin A. Tattam, Attorney-in-fact

The corporate surety has provided the Customs Service with a copy of the signature to be used, a copy of the corporate seal, and a certified copy of the corporate resolution agreeing to be bound by the facsimile signatures and seals. This approval is without prejudice to the surety's right to affix signatures and seals manually.

Dated: May 18, 2000.

LARRY L. BURTON,
Acting Chief,
Entry Procedures and Carriers Branch.

U.S. Customs Service

General Notices

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, May 17, 2000.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

STUART P. SEIDEL,
Assistant Commissioner,
Office of Regulations and Rulings.

PROPOSED REVOCATION OF RULING LETTER AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF SPARK PLUG BOOTS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of ruling letter and treatment relating to tariff classification of spark plug boots.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling relating to the classification under the Harmonized Tariff Schedule of the United States (HTSUS), of spark plug boots, and to revoke any treatment Customs has previously accorded to substantially identical transactions. Spark plug boots consist of ceramic tubular housings with rubber coated electrical connectors at each end. Customs invites comments on the correctness of the proposed action.

DATE: Comments must be received on or before June 30, 2000.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings,

Attention: Commercial Rulings Division, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Submitted comments may be inspected at the same location during regular business hours.

FOR FURTHER INFORMATION CONTACT: James A. Seal, Commercial Rulings Division (202) 927–0760.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **informed compliance** and **shared responsibility**. These concepts are based on the premise that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's rights and responsibilities under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484, Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and declare value on imported merchandise, and to provide other necessary information to enable Customs to properly assess duties, collect accurate statistics and determine whether any other legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that Customs intends to revoke a ruling relating to the tariff classification of spark plug boots. Although in this notice Customs is specifically referring to one ruling, *NY* A82816, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing data bases for rulings in addition to the one/ones identified. No further rulings have been identified. Any party who has received an interpretative ruling or decision (i.e., ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice, should advise Customs during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous

interpretation of the HTSUS. Any person involved in substantially identical transactions should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or his agents for importations of merchandise subsequent to this notice.

In *NY* A82816, dated May 16, 1996, spark plug boots for motor vehicle ignition systems were held to be classifiable in subheading 8536.90.00, HTSUS, as electrical apparatus for making connections to or in electrical circuits, for a voltage not exceeding 1,000 V. This ruling was based on Customs belief that the device met the voltage requirement for that provision. *NY* A82816 is set forth as "Attachment A" to this document.

It is now Customs position that these spark plug boots are classifiable in subheading 8535.90.80, HTSUS, as electrical apparatus for making connections to or in electrical circuits, for a voltage exceeding 1,000 V. Pursuant to 19 U.S.C. 1625(c)(1)), Customs intends to revoke *NY* A82816 and any other ruling not specifically identified to reflect the proper classification of the merchandise pursuant to the analysis in *HQ* 963270, which is set forth as "Attachment B" to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment it previously accorded to substantially identical transactions. Before taking this action, we will give consideration to any written comments timely received.

Dated: May 10, 2000.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, May 16, 1996.

CLA-2-85:RR:NC:MA: 112 A82816
Category: Classification
Tariff No. 8536.90.0090 (EN)

MR. MICHAEL O'NEILL
O'NEILL & WHITAKER, INC.
1809 Baltimore Avenue
Kansas City, MO 64108

Re: The tariff classification of a spark plug boot from Germany.

DEAR MR. O'NEILL:

In your letter dated April 12, 1996, on behalf of Standard Motor Products, Inc., you requested a tariff classification ruling.

As indicated by the submitted sample, a spark plug boot consists of a ceramic tubular housing with rubber coated electrical connectors at each end. Electrical wire runs through the housing between the connectors. The boot is used to complete the circuit between the spark plug and the spark plug wires in a motor vehicle.

The applicable subheading for the spark plug boot will be 8536.90.0090 (EN), Harmonized Tariff Schedule of the United States (HTS), which provides for other electrical apparatus for making connections to or in electrical circuits. The rate of duty will be 4.3 percent ad valorem. In your request, you expressed the opinion that the applicable subheading for the spark plug boot was 8546.90.00 (EN), HTS, which provides for other electrical insulators. Although the ceramic tubular housing and rubber coated connectors do provide a degree of insulation, the principal function of the spark plug boot is to serve as an electrical connector. Accordingly, classification under subheading 8546.90.00 (EN), HTS, is precluded.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist David Curran at 212–466–5680.

ROGER J. SILVESTRI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:GC 963270 JAS
Category: Classification
Tariff No. 8535.90.80

MR. MICHAEL O'NEILL
O'NEILL & WHITAKER, INC.
1809 Baltimore Avenue
Kansas City, MO 64108

Re: *NY* A82816 Revoked; Spark Plug Boot.

DEAR MR. O'NEILL:

In a letter to you, dated May 16, 1996, on behalf of Standard Motor Products, Inc., the Director of Customs National Commodity Specialist Division, New York, held that a spark plug boot was classifiable in subheading 8536.90.00, Harmonized Tariff Schedule of the United States (HTSUS), as electrical apparatus for making connections to or in electrical circuits, for a voltage not exceeding 1,000 V. We have reconsidered this classification and now believe that it is incorrect.

Facts:

The spark plug boot at issue was described in *NY* A82816 as consisting of a ceramic tubular housing with rubber coated electrical connectors at each end. Standard automotive spark plug cables normally have a boot crimped onto each end. The boot on one end of the cable snaps onto a spark plug while the boot on the other end of the cable attaches to the distributor in the ignition system. This completes the circuit between the spark plug and the distributor and provides the spark to ignite the air-fuel mixture in the cylinders of the engine. It was noted in the ruling that while the ceramic housing and rubber coated connectors provided a degree of insulation, the principal function of the spark plug boot was to provide electrical connection.

The HTSUS provisions under consideration are as follows:

8535	Electrical apparatus * * * for making connections to or in electrical circuits * * *, for a voltage exceeding 1,000 V:
* * * * * * *	
8536	Electrical apparatus * * * for making connections to or in electrical circuits * * *, for a voltage not exceeding 1,000 V:

Issue:

Whether the spark plug boot is a good of heading 8535.

Law and Analysis:

Under General Rule of Interpretation (GRI) 1, Harmonized Tariff Schedule of the United States (HTSUS), goods are to be classified according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

Headings 8535 and 8536 both cover electrical apparatus generally used in power distribution systems. Heading 8535 covers electrical apparatus designed for a voltage exceeding 1,000 V, while heading 8536 covers such apparatus designed for a voltage not exceeding 1,000 V. Customs initially believed that heading 8536 covered the voltage rating of the spark plug boots at issue. It is now apparent that in order to jump the gap between the electrodes of the spark plugs, and to trigger the high voltage needed for ignition, the 12-volt potential of today's motor vehicle electrical system must be stepped up to about 20,000 volts. The spark plug boots at issue, therefore, are electrical apparatus described by heading 8535.

Holding:

Under the authority of GRI 1, spark plug boots for motor vehicles, as described, are provided for in heading 8535. They are classifiable in subheading 8535.90.80, HTSUS.

NY A82816, dated May 16, 1996, is revoked.

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED REVOCATION AND MODIFICATION OF RULING LETTERS AND REVOCATION OF TREATMENT RELATING TO TARIFF CLASSIFICATION OF CLOCK RADIOS INCORPORATING SOUND REPRODUCING DEVICES

AGENCY: U.S. Customs Service; Department of the Treasury.

ACTION: Notice of proposed revocation and modification of tariff classification ruling letters and revocation of treatment relating to the classification of clock radios that incorporate microchips that store and reproduce sound.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke two rulings and modify three rulings relating to the tariff classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of clock radios which incorpo-

rate microchips that store and reproduce sound. Similarly, Customs proposes to revoke any treatment previously accorded by it to substantially identical transactions. Comments are invited on the correctness of the intended actions.

DATE: Comments must be received on or before June 30, 2000.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to: U.S. Customs Service, Office of Regulations and Rulings, Attention: General Classification Branch, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Submitted comments may be inspected at the same location during regular business hours.

FOR FURTHER INFORMATION CONTACT: Andrew M. Langreich, General Classification Branch: (202) 927–2318.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts that emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. §1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that Customs intends to revoke two rulings and modify three rulings relating to the tariff classification of a clock radio which incorporate microchips that store and reproduce sound. Although in this notice Customs is specifically referring to New York Ruling Letter (NY) A89251, dated November 8, 1996, Headquarters Ruling Letter HQ 960114, dated September 15, 1997, NY C87866, dated June 11, 1998, NY C88482, dated June 16, 1998, and NY D85257, dated December 3, 1998, this notice covers any rulings on this merchandise that may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing data bases for rulings in

addition to those identified. No other rulings have been found. Any party who has received an interpretive ruling or decision (*i.e.*, ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise Customs during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importation of the same or similar merchandise, or the importer's or Customs previous interpretation of the HTSUS. Any person involved in substantially identical transactions should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importers or their agents for importations of merchandise subsequent to this notice.

In NY A89251, HQ 960114, NY C87866, NY C88482, and NY D85257, Customs classified, in addition in some of these rulings to articles not relevant herein, distinct models of clock radios that incorporate microchips that store and reproduce sound in subheading 8527.19.50, HTSUS, which provides for other radios that incorporate a clock or a clock timer. In NY A89251 and HQ 960114 (which affirmed NY A89251), we classified the Book Crypt Clock Radio with Sound Effects, a clock radio and sound-reproducing device combined in a single, molded plastic casing with book holders, in subheading 8527.19.10, as a clock radio not in combination with any other article. In NY C87866, NY C88482 and NY D85257, we reasoned that the clock radios that incorporate sound reproducing devices should be classified according to their *eo nomine* definitions, *i.e.*, because of the presence of the sound-reproducing devices, the articles were classifiable in the provision that included clock radios "in combination with another article." We have reconsidered our position and determined that when the sounds produced are stored on and reproduced from an electronic sound microchip classifiable in heading 8543, HTSUS, the clock radio remains classifiable in subheading 8527.19.10, HTSUS. Accordingly, we intend to revoke NY A89251 and HQ 960114, and to modify NY C87866, NY C88482, and NY D85257, which are set forth respectively as "Attachment A," "Attachment B," "Attachment C," "Attachment D" and "Attachment E" to this document.

It is now Customs position that the merchandise in NY A89251 and HQ 960114 is classifiable under subheading 8527.19.50, HTSUS, which provides for other reception apparatus for radiobroadcast whether or not combined with sound recording or reproducing apparatus or a clock, other. Proposed HQ 963847 revoking NY A89251 and HQ 960114 is set forth as "Attachment F" to this document.

It is now Customs position that the merchandise in NY C87866, NY C88482, and NY D85257 is classifiable under subheading 8527.19.10, HTSUS, which provides for other reception apparatus for radiobroadcast whether or not combined with sound recording or reproducing apparatus, valued not over $40 each, incorporating a clock or clock-timer, not in combination with any other article, and not designed for motor vehicle installation. Proposed HQ 962340 modifying NY C87866, Proposed HQ 963846 modifying NY D85257, and Proposed HQ 963845 modifying NY C88482 are respectively set forth as "Attachment G," "Attachment H," and "Attachment I" to this document.

Pursuant to 19 U.S.C. 1625(c)(1), Customs intends to revoke NY A89251 and HQ 960114, and to modify NY C87866, NY C88482, and NY D85257 only as they pertain to clock radios that incorporate microchips that store and reproduce sound, and any other ruling not specifically identified, to reflect the proper classification of the merchandise pursuant to the analysis set forth in Proposed HQs 962340, 963845, 963846 and 963847. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. Before taking this action, consideration will be given to any written comments timely received.

Dated: May 16, 2000.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, November 8, 1996.

CLA-2-85:RR:NC:1:108 A89251
Category: Classification
Tariff No. 8527.19.1000

MS. VIENNA DOWNES
MICRO GAMES OF AMERICA
16730 Schoenborn Street
North Hills, CA 91343-6122

Re: The tariff classification of an AM/FM radio from China.

DEAR MS. DOWNES:

In your letter dated October 29, 1996, you requested a tariff classification ruling.

The sample submitted, item number GB4124, is an AM/FM radio incorporating a clock and forming book stand. This item features two "Goosebumps" hands as book holders, motion activated sound effects, a digital alarm clock, an AM/FM radio, built in antenna, volume switch, tuner switch, and is powered by three "AA" batteries.

The applicable subheading for this radio will be 8527.19.1000, Harmonized Tariff Schedule of the United States (HTS), which provides for reception apparatus for radiotelephony

* * *: radiobroadcast receivers * * *: other: valued not over $40 each, incorporating a clock or clock-timer, not in combination with any other article, and not designed for motor vehicle installation. The rate of duty will be free.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Phil Carabetta at 212–466–5872.

ROGER J. SILVESTRI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, September 15, 1997.

CLA–2 RR:TC:GC 960114 JAS
Category: Classification
Tariff No. 8527.19.10

MR. FRED LARIAN
MICRO GAMES OF AMERICA
16730 Schoenborn Street
North Hills, CA 91343–6122

Re: *NY* A89251 Affirmed; "Goosebumps" Model GB–4124 AM/FM Radio/Clock Book Stand With Sound Effects; Reception Apparatus for Radiotelephony, Heading 8527, Sound Effects, Parts of Sound Signaling Apparatus, Heading 8531, Electrical Parts of Machinery, Heading 8548, Plastic Book Case, Furniture, Heading 9403; GRI 3(b) Essential Character.

DEAR MR. LARIAN:

NY A89251, issued to Micro Games of America on November 8, 1996, by the Director, National Commodity Specialist Division, New York Seaport, held that the Book Crypt Clock Radio With Sound Effects, designated "Goosebumps," model GB–4124, manufactured in China, was classifiable in subheading 8527.19.10, Harmonized Tariff Schedule of the United States (HTSUS), as reception apparatus for radiotelephony, valued not over $40 each, incorporating a clock. We have reconsidered this ruling and believe that it should be clarified, but is otherwise correct.

Facts:

As described in *NY* A89251, the Book Crypt Clock Radio With Sound Effects, model GB–4124, consists of a plastic book case with two "Goosebumps" hands on the ends as book holders, into which is incorporated a digital alarm clock with time and date display, AM/FM radio, and motion-activated sound effects in the form of a transducer or electronic chip. Removing a book from or placing a book on the book case activates the "scary" sound effect. The article, which is powered by three "AA" batteries, is imported without books.

The provisions under consideration are as follows:

8527		Reception apparatus for radiotelephony, radiotelegraphy, or radiobroadcasting, whether or not combined, in the same housing, with * * * a clock:
8527.19		Other:
8527.19.10		Valued over $40 each, incorporating a clock * * *, not in combination with any other article, and not designed for motor vehicle installation
8527.19.50		Other

* * * * * * *

8531	Electric sound or visual signaling apparatus (for example, bells, sirens, indicator panels, burglar or fire alarms) * * *; parts thereof:
8531.90	Parts:
8531.90.80	Other
* * * * * * *	
8548	* * * electrical parts of machinery or apparatus, not specified or included elsewhere in [Chapter 85]:
8548.90.00	Other
* * * * * * *	
9403	Other furniture and parts thereof:
9403.70	Furniture of plastics:
9403.70.40	Of reinforced or laminated plastics
9403.70.80	Other

Issue:

Whether the article designated "Goosebumps" is a composite good; whether any component imparts the essential character to the whole.

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

With respect to goods that are, *prima facie,* classifiable in two or more headings, where those headings each refer to part only of the materials or substances contained in composite goods, GRI 3(a) states those headings are to be regarded as equally specific in relation to those goods. GRI 3(b) states, in relevant part, that composite goods made up of different components are to be classified as if consisting only of that component which imparts the essential character to the whole, insofar as this criteria is applicable.

In this case, no single heading describes the Book Crypt Clock Radio With Sound Effects. It is a composite good for tariff purposes which is, *prima facie,* classifiable in the following headings: the clock/radio in heading 8527, the scary sound effects in heading 8531 or in heading 8548, as appropriate, and the book case in heading 9403. The factor which determines essential character will vary with the goods. The nature of a material or component, its bulk, quantity, weight or value, or its role in relation to the use of the good, are factors Customs has previously used in essential character determinations, although other relevant factors may be considered.

In this case, while specific data is not available, the clock/radio component appears to represent the majority of the total cost or value of the "Goosebumps" book case. It is clearly the most functional component and is in use the majority of the time. The book case and sound effects, on the other hand, suggest a seasonal Halloween motif, which is accentuated only when placing or removing a book activates the sound effect. The very name, Book Crypt Clock Radio With Sound Effects, suggests that the clock/radio is the more significant component. For these reasons, we conclude that the AM/FM clock/radio imparts the essential character to the entire article. Under GRI 3(b), the Book Crypt Clock Radio With Sound Effects is to be classified as if consisting *only* of the clock/radio component.

Holding:

Under the authority of GRI 3(b), HTSUS, the Book Crypt Clock Radio With Sound Effects, designated "Goosebumps" model GB–4124, is provided for in heading 8527. Clock radios valued not over $40 each, not in combination with any other article, and not designed for motor vehicle installation are classifiable in subheading 8527.19.10, HTSUS.

NY A89251, dated November 8, 1996, is clarified, but is otherwise affirmed.

MARVIN AMERNICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, June 11, 1998.

CLA–2–84:RR:NC:1:102 C87866
Category: Classification
Tariff No. 8414.51.0090 and 8527.19.5015

MS. TAMMY LOCKS
WHOLESALE SUPPLY COMPANY, INC.
INTERNATIONAL DEPARTMENT,
7100 Service Merchandise Drive
Brentwood, TN 37207

Re: The tariff classification of an aroma diffuser and a clock radio from China.

DEAR MS. LOCKS:

In your letter dated May 12, 1998 you requested a tariff classification ruling.

The items in question are identified as stock # ARM–2 an Aroma Sphere Deluxe Aromatherapy Diffuser and stock # SS–400 identified as a Sound SPA Deluxe Acoustic Relaxation Machine with LCD Alarm Clock & AM/FM Radio. Samples and literature were submitted for review.

The Aroma Sphere is a two-speed fan designed to be used in conjunction with scented "beads" of oils to release aroma into a room. It functions as a table fan and has a self-contained electric motor.

The Sound SPA is an AM/FM Clock Radio which will also play a selection of natural sounds, e.g., spring rain. The radio contains an LCD clock display and a clock-timer.

The applicable subheading for the Aroma Sphere will be 8414.51.0090, Harmonized Tariff Schedule of the United States (HTSUS), which provides for other table fans with self-contained electric motors. The rate of duty will be 4.7 percent ad valorem.

The applicable subheading for the Sound SPA will be 8527.19.5015, HTSUS, which provides for other radios incorporating a clock or clock-timer. The rate of duty will be 3.6 percent ad valorem.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Kenneth T. Brock at 212–466–5493.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT D]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, June 16, 1998.

CLA–2–85:RR:NC:1:108 C88482
Category: Classification
Tariff No. 8519.99.0060 and 8527.19.5015

MR. ART TAYLOR
CONAIR CORPORATION
150 Milford Road
East Windsor, NJ 08520

Re: The tariff classification of a natural sound player from China.

DEAR MR. TAYLOR:

In your letter dated June 3, 1998, you requested a tariff classification ruling.

The items "Sound Therapy Relaxation System and the Deluxe Sound Therapy Relaxation System" are devices which play various natural sounds that have been digitally recorded on microchips. The sounds are of ocean waves, streams, forests, night sounds, heart beats and white noise. These sounds are reputed to have a calming effect on the listener. Both items operate off of battery or electrical plug.

The deluxe system has the ability to program combinations of sounds and has a clock radio.

The applicable subheading for the Sound Therapy Relaxation System will be 8519.99.0060, Harmonized Tariff Schedule of the United States (HTS), which provides for [t]urntables, record players, cassette players and other sound reproducing apparatus, not incorporating a sound recording device: [o]ther sound reproducing apparatus: [o]ther: [o]ther. The rate of duty will be 0.8 percent ad valorem.

The applicable subheading for the Deluxe Sound Therapy Relaxation System will be 8527.19.5015, HTS, which provides for Reception apparatus for radiotelephony, radiotelegraphy or radiobroadcasting, whether or not combined, in the same housing, with sound recording or reproducing apparatus or a clock: Radiobroadcast receivers capable of operating without an external source of power, including apparatus capable of receiving also radiotelephony or radiotelegraphy: other: other * * * incorporating a clock or clock-timer. The rate of duty will be 3.6 percent ad valorem.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported.

If you have any questions regarding the ruling, contact National Import Specialist Michael Contino at 212–466–5672.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT E]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, December 3, 1998.

CLA–2–85:RR:NC:1:108 D85257
Category: Classification
Tariff No. 8527.19.5015

MS. LAURA DENNY
CBT INTERNATIONAL INC.
110 West Ocean Blvd.
Suite 728
Long Beach, CA 90802

Re: The tariff classification of an AM/FM Clock Radio/Stereo Sound Therapy apparatus from China.

DEAR MS. DENNY:

In your letter dated November 23, 1998, on behalf of your client J B Research, you requested a tariff classification ruling.

The item is called the "Stereo Sound Therapy", model number 722. It is a battery operated AM/FM clock radio combined in the same housing with a sound reproducing device and included in the retail package is a remote control device.

The sound device reproduces, via a microchip, twelve nature sounds including, ocean waves, song birds, night sounds of crickets and sounds of rain etc. The AM/FM clock radio operates as a standard reception apparatus for radiobroadcasting.

The specific features, the AM/FM clock radio and the natural sound device can operate independently of each other via separate controls. Each feature has a clearly defined function.

The applicable subheading for the Stereo Sound Therapy will be 8527.19.5015, Harmonized Tariff Schedule of the United States (HTS), which provides for Reception apparatus for radiotelephony, radiotelegraphy or radiobroadcasting, whether or not combined, in the same housing, with sound recording or reproducing apparatus or a clock: Radiobroadcast receivers capable of operating without an external source of power, including apparatus capable of receiving also radiotelephony or radiotelegraphy: Other: Other * * * Incorporating a clock or clock timer. The rate of duty will be 3.6 percent ad valorem.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177)

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Michael Contino at 212–466–5672.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT F]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:GC 963847 AML
Category: Classification
Tariff No. 8527.19.50

MR. FRED LARIAN
MICRO GAMES OF AMERICA
16730 Schoenborn Street
North Hills, CA 91343–6122

Re: Reconsideration of NY A89251 and HQ 960144; clock radio that incorporates a book stand and sound reproducing device.

DEAR MR. LARIAN:

This is in regard to New York Ruling Letter (NY) A89251, issued to you by the Customs National Commodity Specialist Division, New York, on November 8, 1996, and Headquarters Ruling Letter (HQ) 960114, dated September 15, 1997, which affirmed NY A89251. In those rulings, the Book Crypt Clock Radio With Sound Effects, model # GB–4124, a clock radio which incorporates a book stand and a sound reproducing device, was classified under subheading 8527.19.10, Harmonized Tariff Schedule of the United States (HTSUS). We have reviewed the classification of the item and determined that it is incorrect. This ruling sets forth the correct classification.

Facts:

The Book Crypt Clock Radio With Sound Effects, model GB–4124, consists of a molded plastic book holder with two "Goosebumps" hands sized and spaced sufficiently to function as book ends, into which is incorporated a liquid crystal display (LCD) digital alarm clock with time and date display, an AM/FM radio with rotary tuning, built-in antenna, and motion-activated sound effects in the form of a transducer or electronic chip. Removing a book from or placing a book on the bookcase activates "scary" sound effects such as "shrieking ghosts, evil laughter and monster roars." The article, which is powered by three "AA" batteries, is imported without books.

Issue:

Whether the clock radio combined with a book shelf and sound reproducing apparatus is classifiable under subheading 8527.19.10, HTSUS, as other reception apparatus for radiobroadcasting, whether or not combined with sound recording or reproducing apparatus, valued over $40 each, incorporating a clock or clock-timer, not in combination with any other article, and not designed for motor vehicle installation; or in subheading 8527.19.50, HTSUS, other?

Law and Analysis:

Classification of imported merchandise is accomplished pursuant to the Harmonized Tariff Schedule of the United States (HTSUS). Classification under the HTSUS is guided by the General Rules of Interpretation of the Harmonized System (GRIs). GRI 1, HTSUS, states in part that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes[.]" GRI 2(b) provides in pertinent part that "[a]ny reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance [and] [t]he classification of goods consisting of more than one material or substance shall be according to the principles of [GRI] 3."

The HTSUS headings and subheadings under consideration are as follows:

3926	Other articles of plastics and articles of other materials of headings 3901 to 3914:
3926.10.00	Office or school supplies.
3926.90	Other:
3926.90.98	Other.

* * * * * * *

8527	Reception apparatus for radiotelephony, radiotelegraphy or radiobroadcasting, whether or not combined, in the same housing, with sound recording or reproducing apparatus or a clock:
	Radiobroadcast receivers capable of operating without an external source of power, of a kind used in motor vehicles, including apparatus capable of receiving also radiotelephony or radiotelegraphy:
8527.13	Other apparatus combined with sound recording or reproducing apparatus:
	Other:
8527.13.60	Other.
8527.19	Other:
8527.19.10	Valued not over $40 each, incorporating a clock or clock-timer, not in combination with any other article, and not designed for motor vehicle installation.
8527.19.50	Other.
* * * * * * *	
8543	Electrical machines and apparatus, having individual functions, not specified or included elsewhere in this chapter; parts thereof:
	Other machines and apparatus:
	Other:
	Other:
8543.89.96	Other.

The question for classification purposes is whether the clock radio or the sound-reproducing device or the molded plastic book holder imparts the essential character of the article. It appears from the photocopies that the plastic components predominate the bulk of the holders. However, the clock radio and sound reproducing device are central to the use of the goods.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System. While not legally binding on the contracting parties, and therefore not dispositive, the ENs provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the System. Customs believes the ENs should always be consulted. See T.D. 89–80, published in the Federal Register August 23, 1989 (54 FR 35127, 35128).

The molded plastic book ends/holder cannot be classified in heading 9403, HTSUS, as furniture, because EN 94.03, HTSUS, requires that the articles classifiable in that heading must be stackable or placed on the floor. Neither can the molded plastic book ends/holder be classified in heading 8304, HTSUS, as other desk equipment, because EN 83.04 provides that for an article to be classifiable in that heading, an article must be made of base metal. Therefore the molded plastic component of the article is classifiable in heading 3926, HTSUS, which provides for articles of plastic.

The clock radio component of the composite article would itself be classifiable within heading 8527, HTSUS, which provides for, *inter alia*, clock radios. The electronic sound microchip component would be classifiable under subheading 8543.89.96, HTSUS, as other electrical machines and apparatus, having individual functions, not specified or included elsewhere in Chapter 85. See Headquarters Ruling Letter (HQ) 955116, dated October 8, 1993; HQ 953105, dated April 15, 1993; and HQ 954363, dated August 27, 1993, which found such articles to be classifiable in subheading 8543.80.90, HTSUS, the predecessor to subheading 8543.89.96, HTSUS.

The legal notes to Section XVI provide, in pertinent part, that:

* * * * * * *

> 3. Unless the context otherwise requires, composite machines consisting of two or more machines fitted together to form a whole and other machines adapted for the purpose of performing two or more complementary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the principal function.

* * * * * * *

As a result of amendments to the ENs made in 1989, the EN to heading 8543, HTSUS, provides, in pertinent part:

> The heading includes, *inter alia*:
>
> * * * * * * *
>
> (13) Electronic musical modules for incorporation in a wide variety of utilitarian or other goods, *e.g.*, wrist watches, cups and greeting cards. These modules usually consist of an electronic integrated circuit, a resistor, a loudspeaker and a mercury cell. They contain fixed musical programmes.

EN 85.43(13) states that heading 8543 includes electronic music modules, to which the subject sound devices are similar. However, we note that musical mechanisms are also mentioned in the ENs to the music box provision, heading 9208, HTSUS, which states:

> Articles which incorporate a musical mechanism but which are essentially utilitarian or ornamental in function (for example, clocks, miniature wooden furniture, glass vases containing artificial flowers, ceramic figurines) **are not** regarded as musical boxes within the meaning of this heading. These articles are classified in the same headings as the corresponding articles not incorporating a musical mechanism [emphasis in original].
>
> Also, articles such as wristwatches, cups and greeting cards containing electronic musical modules **are not** regarded as goods of this heading. Such articles are classified in the same headings as the corresponding articles not incorporating such modules [emphasis in original].

Customs has recognized the treatment of such microchips by the World Customs Organization ("WCO") (*i.e.*, that articles containing such chips should be classified in the same headings as the corresponding articles not incorporating a musical mechanism) in several rulings: Headquarters Ruling Letter (HQ) 958397, dated December 19, 1995; HQ 959552, dated November 22, 1996; HQ 959043, dated April 11, 1997, and HQ 959403, dated April 11, 1997. In each of those rulings Customs noted that:

> In 1989, anticipating classification problems with respect to merchandise containing such musical mechanisms, the Customs Cooperation Council or CCC (now the World Customs Organization or WCO) provided guidance which Customs has long followed. With electronic chips having become relatively inexpensive and simple to install in a wide variety of products, the CCC suggested that merchandise containing battery-operated chips with speakers, should be classified in the same headings as the corresponding articles not incorporating such modules.

In light of the above, the intent of the drafters of the international Harmonized System was to take no notice of sound microchips, whether they produce musical or other sounds, in classifying goods that contain them. By application of Note 3 to Section XVI, and in accordance with the above guidance of the WCO, we believe the "Goosebumps" is a composite machine whose principal function is provided by the clock radio, not the sound microchip. Therefore, at GRI 1, the component consisting of a clock radio that incorporates a sound-reproducing device is classified as a clock radio in heading 8527. Heading 8543 and the microchip are eliminated from further consideration in classifying the merchandise at issue.

Because the "Book Crypt Clock Radio with Sound Effects" is comprised of distinct components (the plastic book holder and the clock radio incorporating a sound reproducing device), the heading in which the article is classifiable cannot be determined pursuant to GRI 1. Resort must then be made to the remaining GRIs.

GRI 3 states, in pertinent part:

> When by application of [GRI] 2(b) or for any other reason, goods are, *prima facie*, classifiable under two or more headings, classification shall be effected as follows:
>
> (a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.
>
> (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.
>
> * * * * * * *

EN V to GRI 3(a), p. 4, states in pertinent part that "when two or more headings each refer to part only of the materials contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description than the others. In such cases, the classification shall be determined by [GRIs] 3(b) or 3(c)." The product under consideration is one in which different materials form a practically inseparable whole. Resort then to GRIs 3(b) and 3(c) must be made in order to make a classification.

The term "essential character" is not defined within the HTSUS, GRIs or ENs. EN VIII to GRI 3(b), p. 4, gives guidance, stating that:

> [t]he factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.

Recently, there have been several decisions by the Court of International Trade (CIT) which addressed "essential character" for purposes of GRI 3(b). *Better Home Plastics Corp. v. United States*, 916 F. Supp. 1265 (CIT 1996), affirmed, 119 F. 3rd 969 (Fed. Cir. 1997), involved the classification of shower curtain sets, consisting of an outer textile curtain, inner plastic magnetic liner, and plastic hooks. The Court examined the role of the constituent materials in relation to the use of the goods and found that, although the relative value of the textile curtain was greater than that of the plastic liner, and that although the textile curtain also served protective, privacy and decorative functions, because of the fact that the plastic liner served the indispensable function of keeping water inside the shower, the plastic liner imparted the essential character upon the set. See also *Mita Copystar America, Inc. v. United States*, 966 F. Supp. 1245 (CIT 1997), motion for rehearing and reconsideration denied, 994 F. Supp. 393 (CIT 1998), and *Vista International Packaging Co. v. United States*, 19 CIT 868, 890 F. Supp. 1095 (1995), in which the Court also looked to the role of the constituent material in relation to the use of the goods to determine essential character.

Consideration of the "Book Crypt Clock Radio with Sound Effects" reveals that although the molded plastic case houses the electronics of the clock radio, supports books and aesthetically enhances the product, it is the clock radio that imparts the essential character of the product. The clock radio is the component that is emphasized in the advertisement and on the packaging of the article. The nature of the clock radio component, its value, and its central role in relation to the use of the goods all contribute to a finding that the essential character of the article is imparted by the clock radio. Therefore, the article is classifiable at GRI 3(b) in heading 8527, HTSUS.

The "Goosebumps" is a clock radio combined with a molded plastic book holder and a sound-reproducing device, within the same housing. Because the article is designed for table or desktop use, and because of the inclusion of the clock radio, the reasonable conclusion is that the article is intended for bedroom use. By application of GRI 6 and by reference to GRI 1, consideration of the appropriate 6-digit heading is next.

Classification of the subject article within subheadings 8527.13 or 8527.19, HTSUS, must be considered. Included within heading 8527, HTSUS, is "[r]eception apparatus * * * whether or not combined, in the same housing, with sound recording or reproducing apparatus or a clock[.]" Radiobroadcast reception apparatus are separated between apparatus capable of operating without an external source of power (subheadings 8527.12 through 8527.19, HTSUS) and apparatus incapable of operating without an external source of power (subheadings 8527.21 through 8527.29, HTSUS). In the first category are pocket sized radio cassette players (subheading 8527.12.00, HTSUS), other apparatus combined with sound recording or reproducing apparatus (subheading 8527.13, HTSUS), and other (than the above)(subheading 8527.19, HTSUS).

The "Goosebumps" is not a pocket sized radio cassette player, so subheading 8527.12.00, HTSUS, is inapplicable. Subheading 8527.13, HTSUS, is also inapplicable because it provides for apparatus combined with sound recording or reproducing apparatus. As noted above, the microchip is not a sound reproducing device of heading 8527 because it is classified in heading 8543, HTSUS. Thus, subheading 8527.13 does not describe the merchandise. The goods are specifically and completely described in the residual provision, subheading 8527.19, as a radiobroadcast receiver combined with a clock.

Subheading 8527.19 incorporates all radios combined with other articles of the one-dash provision at issue. Of those apparatus captured in subheading 8527.19, subheading

8527.19.50 captures this article because it is a clock radio in combination with any other article. By operation of Note 3 to Section XVI, and in consideration of the distinct plastic book holder with which it is combined, we find that the clock radio is specifically described in subheading 8527.19.50, HTSUS.

Holding:

The "Goosebumps" model # GB–4124, a clock radio which incorporates a book stand and a sound reproducing device, is classifiable under subheading 8527.19.50, HTSUS, which provides for other reception apparatus for radiotelephony combined with sound recording or reproducing apparatus, valued not over $40 each, incorporating a clock or clock-timer, in combination with another article, and not designed for motor vehicle installation.

Effect on Other Rulings:

NY A89251 and HQ 960114 are revoked.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT G]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:GC 962340 AML
Category: Classification
Tariff No. 8527.19.10

MR. KENNETH R. PALEY
SHARRETTS, PALEY, CARTER & BLAUVELT, P.C.
Sixty Seven Broad Street
New York, NY 10004

Re: Reconsideration of NY C87866; Clock radio incorporating a microchip that electronically stores and reproduces sounds.

DEAR MR. PALEY:

In a letter dated November 4, 1998, you requested, on behalf of Wholesale Supply Company, Inc., reconsideration of New York Ruling Letter (NY) C87866, dated June 11, 1998, concerning the classification of the "Sound Spa," a clock radio that contains a microchip incorporated into the radio circuitry where it stores and reproduces sounds, under the Harmonized Tariff Schedule of the United States (HTSUS). In NY C87866, the "Sound Spa," among other articles not relevant herein, was found to be classifiable under subheading 8527.19.50, HTSUS, which provides for other radios incorporating a clock or clock-timer. A sample was submitted for our review. In preparing this ruling, consideration was given to arguments made at our meeting held at Customs Headquarters on May 27, 1999, and to your supplemental submission dated August 19, 1999. We regret the delay in responding.

Facts:

The "Sound Spa," model # SS–400, is an AM/FM clock radio which, besides the AM/FM radio function, presumably contains a microchip that is incorporated into the radio circuitry, where it stores and reproduces any of a selection of the following six "natural" sounds: woodlands, spring rain, mountain stream, white noise, ocean waves and summer night. The article has a liquid crystal display (LCD) clock powered by a single, triple A ("AAA") battery, as well as alarm and snooze features. The radio and sound reproducing features can function either when powered by three double A ("AA") batteries or electricity via an AC adapter. The article has an "auto sleep timer" which facilitates listening to the sound of the radio or sound reproducing function for a measured increment of time after which the article will turn off the sound being emitted. The FOB price of the article is less than $40.00.

Issue:

Whether the "Sound Spa," a clock radio incorporating sound reproducing apparatus, is classifiable under subheading 8527.19.10, HTSUS, as other reception apparatus for radiobroadcasting, whether or not combined with sound recording or reproducing apparatus, valued not over $40 each, incorporating a clock or clock-timer, not in combination with any other article, and not designed for motor vehicle installation?

Law and Analysis:

Classification of imported merchandise is accomplished pursuant to the Harmonized Tariff Schedule of the United States (HTSUS). Classification under the HTSUS is guided by the General Rules of Interpretation of the Harmonized System (GRIs). GRI 1, HTSUS, states in part that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes[.]"

The applicable headings and subheadings under consideration are as follows:

8527	Reception apparatus for radiotelephony, radiotelegraphy or radiobroadcasting, whether or not combined, in the same housing, with sound recording or reproducing apparatus or a clock:
	Radiobroadcast receivers capable of operating without an external source of power, of a kind used in motor vehicles, including apparatus capable of receiving also radiotelephony or radiotelegraphy:
8527.13	Other apparatus combined with sound recording or reproducing apparatus:
	Other:
8527.13.60	Other.
8527.19	Other:
8527.19.10	Valued not over $40 each, incorporating a clock or clock-timer, not in combination with any other article, and not designed for motor vehicle installation.
8527.19.50	Other.
* * * * * * *	
8543	Electrical machines and apparatus, having individual functions, not specified or included elsewhere in this chapter; parts thereof:
	Other machines and apparatus:
	Other:
	Other:
8543.89.96	Other.

The legal notes to Section XVI provide, in pertinent part, that:

* * * * * * *

3. Unless the context otherwise requires, composite machines consisting of two or more machines fitted together to form a whole and other machines adapted for the purpose of performing two or more complementary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the principal function.

* * * * * * *

Heading 8527, HTSUS, provides for various combinations of radios with clocks, tape players, tape recorders, CD players, and for models that have different sources of power, usually battery or electricity. The "Sound Spa" is a clock radio combined with an electronic sound microchip within the same housing. Because of the inclusion of the clock, alarm and sleep timer functions, the reasonable conclusion is that the article is intended for bedside use. At the meeting held at Customs Headquarters, you agreed with Customs that the "natural" sounds were stored and reproduced from a microchip. In your supplemental submission, you averred that you were unable to provide the value of the microchip. The sound microchip has its own controls, and presumably shares the power source, circuitry and speaker of the radio. Considered separately, the electronic sound microchip would be classifiable under subheading 8543.89.96, HTSUS, as other electrical machines and apparatus, having individual functions, not specified or included elsewhere in Chapter 85. See Headquarters Ruling Letter (HQ) 955116, dated October 8, 1993; HQ 953105, dated April 15, 1993; and HQ 954363, dated August 27, 1993, which found such articles to be classifiable in subheading 8543.80.90, HTSUS, the predecessor to subheading 8543.89.96, HTSUS.

The Harmonized Commodity Description And Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System. While not legally binding

on the contracting parties, and therefore not dispositive, the ENs provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the System. Customs believes the ENs should always be consulted. See T.D. 89–80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

As a result of amendments to the ENs made in 1989, the EN to heading 8543, HTSUS, provides, in pertinent part:

> The heading includes, *inter alia*:
>
> * * * * * * *
>
> (13) Electronic musical modules for incorporation in a wide variety of utilitarian or other goods, *e.g.*, wrist watches, cups and greeting cards. These modules usually consist of an electronic integrated circuit, a resistor, a loudspeaker and a mercury cell. They contain fixed musical programmes.

EN 85.43(13) states that heading 8543 includes electronic music modules, to which the subject sound devices are akin. However, we note that musical mechanisms are also mentioned in the ENs to the music box provision, heading 9208, HTSUS, which states:

> Articles which incorporate a musical mechanism but which are essentially utilitarian or ornamental in function (for example, clocks, miniature wooden furniture, glass vases containing artificial flowers, ceramic figurines) **are not** regarded as musical boxes within the meaning of this heading. These articles are classified in the same headings as the corresponding articles not incorporating a musical mechanism [emphasis in original].
>
> Also, articles such as wrist watches, cups and greeting cards containing electronic musical modules **are not** regarded as goods of this heading. Such articles are classified in the same headings as the corresponding articles not incorporating such modules [emphasis in original].

Customs has recognized the treatment of such microchips by the World Customs Organization ("WCO") (*i.e.*, that articles containing such chips should be classified in the same headings as the corresponding articles not incorporating a musical mechanism) in several rulings: Headquarters Ruling Letter (HQ) 958397, dated December 19, 1995; HQ 959552, dated November 22, 1996; HQ 959043, dated April 11, 1997, and HQ 959403, dated April 11, 1997. In each of those rulings Customs noted that:

> In 1989, anticipating classification problems with respect to merchandise containing such musical mechanisms, the Customs Cooperation Council or CCC (now the World Customs Organization or WCO) provided guidance which Customs has long followed. With electronic chips having become relatively inexpensive and simple to install in a wide variety of products, the CCC suggested that merchandise containing battery-operated chips with speakers, should be classified in the same headings as the corresponding articles not incorporating such modules.

In light of the above, the intent of the drafters of the international Harmonized System was to take no notice of sound microchips, whether they produce musical or other sounds, in classifying goods that contain them. By application of Note 3 to Section XVI, and in accordance with the above guidance of the WCO, we believe the Sound Spa is a composite machine whose principal function is provided by the clock radio, not the sound microchip. Therefore, at GRI 1, the instant article is classified as a clock radio in heading 8527. Heading 8543 and the microchip are eliminated from further consideration in classifying the merchandise at issue.

Classification of the subject article within subheadings 8527.13 or 8527.19, HTSUS, has been suggested. Included within heading 8527, HTSUS, is "[r]eception apparatus * * * whether or not combined, in the same housing, with sound recording or reproducing apparatus or a clock[.]" Radiobroadcast reception apparatus are separated between apparatus capable of operating without an external source of power (subheadings 8527.12 through 8527.19, HTSUS) and apparatus incapable of operating without an external source of power (subheadings 8527.21 through 8527.29, HTSUS). In the first category are pocket sized radio cassette players (subheading 8527.12.00, HTSUS), other apparatus combined with sound recording or reproducing apparatus (subheading 8527.13, HTSUS), and other (than the above)(subheading 8527.19, HTSUS).

The "Sound Spa" is not a pocket sized radio cassette player, so subheading 8527.12.00, HTSUS, is inapplicable. Subheading 8527.13, HTSUS, is also inapplicable because it provides for apparatus combined with sound recording or reproducing apparatus. As noted above, the microchip is not a sound reproducing device of heading 8527 because it is classified in heading 8543, HTSUS. Thus, subheading 8527.13 does not describe the merchan-

dise. The goods are specifically and completely described in the residual provision, subheading 8527.19, as a radiobroadcast receiver combined with a clock.

Subheading 8527.19 incorporates all radios combined with other articles of the one-dash provision at issue. Of those apparatus captured in subheading 8527.19, subheading 8527.19.10 covers those, in pertinent part, valued not over $40 each, incorporating a clock or clock-timer, and not in combination with any other article. By operation of Note 3 to Section XVI, we find that the clock radio is specifically described in subheading 8527.19.10, HTSUS.

Holding:

The Sound Spa is classifiable under subheading 8527.19.10, HTSUS, which provides for other reception apparatus for radiotelephony combined with sound recording or reproducing apparatus, valued not over $40 each, incorporating a clock or clock-timer, not in combination with any other article, and not for installation in a motor vehicle.

Effect on Other Rulings:

NY C87866 is modified.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT H]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA-2 RR:CR:GC 963846 AML
Category: Classification
Tariff No. 8527.19.10

MS. LAURA DENNY
CBT INTERNATIONAL INC.
110 West Ocean Blvd.
Suite 728
Long Beach, CA 90802

Re: Reconsideration of NY D85257; a clock radio that incorporates a sound reproducing device.

DEAR MS. DENNY:

This is in regard to New York Ruling Letter (NY) D85257, issued to you by the Customs National Commodity Specialist Division, New York, on December 3, 1998, on behalf of J.B. Research. In that ruling, the "Stereo Sound Therapy," model # 722, a clock radio which incorporates a sound reproducing device, was classified under subheading 8527.19.50, Harmonized Tariff Schedule of the United States (HTSUS). We have reviewed the classification of the item and determined that it is incorrect. This ruling sets forth the correct classification.

Facts:

The "Stereo Sound Therapy," is a clock radio which, besides the radio function, can program and produce any of a selection of twelve "natural" sounds, such as ocean waves, song birds, night sounds of crickets, sounds of rain, etc. The sounds are stored on a microchip within the article. The article is sold with a remote control device. The FOB price of the article is less than $40.00.

Issue:

Whether the clock radio combined with sound reproducing apparatus is classifiable under subheading 8527.19.10, HTSUS, as other reception apparatus for radiobroadcasting, whether or not combined with sound recording or reproducing apparatus, valued not over

$40 each, incorporating a clock or clock-timer, in combination with any other article, and not designed for motor vehicle installation?

Law and Analysis:

Classification of imported merchandise is accomplished pursuant to the Harmonized Tariff Schedule of the United States (HTSUS). Classification under the HTSUS is guided by the General Rules of Interpretation of the Harmonized System (GRI's). GRI 1, HTSUS, states in part that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes[.]"

The HTSUS heading and subheadings under consideration are as follows:

8527	Reception apparatus for radiotelephony, radiotelegraphy or radiobroadcasting, whether or not combined, in the same housing, with sound recording or reproducing apparatus or a clock:
	Radiobroadcast receivers capable of operating without an external source of power, of a kind used in motor vehicles, including apparatus capable of receiving also radiotelephony or radiotelegraphy:
8527.13	Other apparatus combined with sound recording or reproducing apparatus:
	Other:
8527.13.60	Other.
8527.19	Other:
8527.19.10	Valued not over $40 each, incorporating a clock or clock-timer, not in combination with any other article, and not designed for motor vehicle installation.
8527.19.50	Other.
* * * * * * *	
8543	Electrical machines and apparatus, having individual functions, not specified or included elsewhere in this chapter; parts thereof:
	Other machines and apparatus:
	Other:
	Other:
8543.89.96	Other.

The legal notes to Section XVI provide, in pertinent part, that:

* * * * * * *

3. Unless the context otherwise requires, composite machines consisting of two or more machines fitted together to form a whole and other machines adapted for the purpose of performing two or more complementary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the principal function.

* * * * * * *

Heading 8527, HTSUS, provides for various combinations of radios with clocks, tape players, tape recorders, CD players, and for models that have different sources of power, usually battery or electricity. The "Stereo Sound Therapy" is a clock radio combined with an electronic sound microchip within the same housing. Because of the inclusion of the clock, alarm and sleep timer functions, the reasonable conclusion is that the article is intended for bedside use. The sound microchip has its own controls, and presumably shares the power source, circuitry and speaker of the radio. Considered separately, the electronic sound microchip would be classifiable under subheading 8543.89.96, HTSUS, as other electrical machines and apparatus, having individual functions, not specified or included elsewhere in Chapter 85. See Headquarters Ruling Letter (HQ) 955116, dated October 8, 1993; HQ 953105, dated April 15, 1993; and HQ 954363, dated August 27, 1993, which found such articles to be classifiable in subheading 8543.80.90, HTSUS, the predecessor to subheading 8543.89.96, HTSUS.

The Harmonized Commodity Description And Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System. While not legally binding on the contracting parties, and therefore not dispositive, the ENs provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the System. Customs believes the ENs should always be consulted. See T.D. 89–80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

As a result of amendments to the ENs made in 1989, the EN to heading 8543, HTSUS, provides, in pertinent part:

> The heading includes, *inter alia*:
>
> * * * * * * *
>
> (13) Electronic musical modules for incorporation in a wide variety of utilitarian or other goods, *e.g.*, wrist watches, cups and greeting cards. These modules usually consist of an electronic integrated circuit, a resistor, a loudspeaker and a mercury cell. They contain fixed musical programmes.

EN 85.43(13) states that heading 8543 includes electronic music modules, to which the subject sound devices are akin. However, we note that musical mechanisms are also mentioned in the ENs to the music box provision, heading 9208, HTSUS, which states:

> Articles which incorporate a musical mechanism but which are essentially utilitarian or ornamental in function (for example, clocks, miniature wooden furniture, glass vases containing artificial flowers, ceramic figurines) **are not** regarded as musical boxes within the meaning of this heading. These articles are classified in the same headings as the corresponding articles not incorporating a musical mechanism [emphasis in original].
>
> Also, articles such as wristwatches, cups and greeting cards containing electronic musical modules **are not** regarded as goods of this heading. Such articles are classified in the same headings as the corresponding articles not incorporating such modules [emphasis in original].

Customs has recognized the treatment of such microchips by the World Customs Organization ("WCO") (*i.e.*, that articles containing such chips should be classified in the same headings as the corresponding articles not incorporating a musical mechanism) in several rulings: Headquarters Ruling Letter (HQ) 958397, dated December 19, 1995; HQ 959552, dated November 22, 1996; HQ 959043, dated April 11, 1997, and HQ 959403, dated April 11, 1997. In each of those rulings Customs noted that:

> In 1989, anticipating classification problems with respect to merchandise containing such musical mechanisms, the Customs Cooperation Council or CCC (now the World Customs Organization or WCO) provided guidance which Customs has long followed. With electronic chips having become relatively inexpensive and simple to install in a wide variety of products, the CCC suggested that merchandise containing battery-operated chips with speakers, should be classified in the same headings as the corresponding articles not incorporating such modules.

In light of the above, the intent of the drafters of the international Harmonized System was to take no notice of sound microchips, whether they produce musical or other sounds, in classifying goods that contain them. By application of Note 3 to Section XVI, and in accordance with the above guidance of the WCO, we believe the Sound Spa is a composite machine whose principal function is provided by the clock radio, not the sound microchip. Therefore, at GRI 1, the instant article is classified as a clock radio in heading 8527. Heading 8543 and the microchip are eliminated from further consideration in classifying the merchandise at issue.

Classification of the subject article within subheadings 8527.13 or 8527.19, HTSUS, has been suggested. Included within heading 8527, HTSUS, is "[r]eception apparatus * * * whether or not combined, in the same housing, with sound recording or reproducing apparatus or a clock[.]" Radiobroadcast reception apparatus are separated between apparatus capable of operating without an external source of power (subheadings 8527.12 through 8527.19, HTSUS) and apparatus incapable of operating without an external source of power (subheadings 8527.21 through 8527.29, HTSUS). In the first category are pocket sized radio cassette players (subheading 8527.12.00, HTSUS), other apparatus combined with sound recording or reproducing apparatus (subheading 8527.13, HTSUS), and other (than the above)(subheading 8527.19, HTSUS).

The "Stereo Sound Therapy" is not a pocket sized radio cassette player, so subheading 8527.12.00, HTSUS, is inapplicable. Subheading 8527.13, HTSUS, is also inapplicable because it provides for apparatus combined with sound recording or reproducing apparatus. As noted above, the microchip is not a sound reproducing device of heading 8527 because it is classified in heading 8543, HTSUS. Thus, subheading 8527.13 does not describe the merchandise. The goods are specifically and completely described in the residual provision, subheading 8527.19, as a radiobroadcast receiver combined with a clock.

Subheading 8527.19 incorporates all radios combined with other articles of the one-dash provision at issue. Of those apparatus captured in subheading 8527.19, subheading

8527.19.10 covers those, in pertinent part, valued not over $40 each, incorporating a clock or clock-timer, and not in combination with any other article. By operation of Note 3 to Section XVI, we find that the clock radio is specifically described in subheading 8527.19.10, HTSUS.

Holding:

The Stereo Sound Therapy is classifiable under subheading 8527.19.10, HTSUS, which provides for other reception apparatus for radiotelephony combined with sound recording or reproducing apparatus, valued not over $40 each, incorporating a clock or clock-timer, not in combination with any other article, and not designed for motor vehicle installation.

Effect on Other Rulings:

NY D85257 is modified.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT I]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:GC 963845 AML
Category: Classification
Tariff No. 8527.19.10

MR. ART TAYLOR
CONAIR CORPORATION
150 Milford Road
East Windsor, NJ 08520

Re: Reconsideration of NY C88482; a clock radio that incorporates a sound reproducing device.

DEAR MR. TAYLOR:

This is in regard to New York Ruling Letter (NY) C88482, issued to you by the Customs National Commodity Specialist Division, New York, on June 16, 1998. In that ruling, the "Deluxe Sound Therapy Relaxation System," a clock radio that incorporates a sound reproducing device, among other articles not relevant herein, was classified under subheading 8527.19.50, Harmonized Tariff Schedule of the United States (HTSUS). We have reviewed the classification of the item and determined that it is incorrect. This ruling sets forth the correct classification.

Facts:

The "Deluxe Sound Therapy Relaxation System," is a clock radio which, besides the radio function, can program and produce any of a selection of "natural" sounds: ocean waves, streams, forests, night sounds, heart beats and white noise. The sounds are stored on a microchip within the article. The FOB price of the article is less than $40.00.

Issue:

Whether the clock radio combined with sound reproducing apparatus is classifiable under subheading 8527.19.10, HTSUS, as other reception apparatus for radiobroadcasting, whether or not combined with sound recording or reproducing apparatus, valued not over $40 each, incorporating a clock or clock-timer, not in combination with any other article, and not designed for motor vehicle installation?

Law and Analysis:

Classification of imported merchandise is accomplished pursuant to the Harmonized Tariff Schedule of the United States (HTSUS). Classification under the HTSUS is guided

by the General Rules of Interpretation of the Harmonized System (GRI's). GRI 1, HTSUS, states in part that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes[.]"

The HTSUS headings and subheadings under consideration are as follows:

8527	Reception apparatus for radiotelephony, radiotelegraphy or radiobroadcasting, whether or not combined, in the same housing, with sound recording or reproducing apparatus or a clock:
	Radiobroadcast receivers capable of operating without an external source of power, of a kind used in motor vehicles, including apparatus capable of receiving also radiotelephony or radiotelegraphy:
8527.13	Other apparatus combined with sound recording or reproducing apparatus:
	Other:
8527.13.60	Other.
8527.19	Other:
8527.19.10	Valued not over $40 each, incorporating a clock or clock-timer, not in combination with any other article, and not designed for motor vehicle installation.
8527.19.50	Other.
* * * * * * *	
8543	Electrical machines and apparatus, having individual functions, not specified or included elsewhere in this chapter; parts thereof:
	Other machines and apparatus:
	Other:
	Other:
8543.89.96	Other.

The legal notes to Section XVI provide, in pertinent part, that:

* * * * * * *

3. Unless the context otherwise requires, composite machines consisting of two or more machines fitted together to form a whole and other machines adapted for the purpose of performing two or more complementary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the principal function.

* * * * * * *

Heading 8527, HTSUS, provides for various combinations of radios with clocks, tape players, tape recorders, CD players, and for models that have different sources of power, usually battery or electricity. The "Deluxe Sound Therapy Relaxation System" is a clock radio combined with an electronic sound microchip within the same housing. Because of the inclusion of the clock, alarm and sleep timer functions, the reasonable conclusion is that the article is intended for bedside use. The sound microchip has its own controls, and presumably shares the power source, circuitry and speaker of the radio. Considered separately, the electronic sound microchip would be classifiable under subheading 8543.89.96, HTSUS, as other electrical machines and apparatus, having individual functions, not specified or included elsewhere in Chapter 85. See Headquarters Ruling Letter (HQ) 955116, dated October 8, 1993; HQ 953105, dated April 15, 1993; and HQ 954363, dated August 27, 1993, which found such articles to be classifiable in subheading 8543.80.90, HTSUS, the predecessor to subheading 8543.89.96, HTSUS.

The Harmonized Commodity Description And Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System. While not legally binding on the contracting parties, and therefore not dispositive, the ENs provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the System. Customs believes the ENs should always be consulted. See T.D. 89–80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

As a result of amendments to the ENs made in 1989, the EN to heading 8543, HTSUS, provides, in pertinent part:

The heading includes, *inter alia*:

* * * * * * *

(13) Electronic musical modules for incorporation in a wide variety of utilitarian or other goods, *e.g.*, wrist watches, cups and greeting cards. These modules usually con-

> sist of an electronic integrated circuit, a resistor, a loudspeaker and a mercury cell. They contain fixed musical programmes.

EN 85.43(13) states that heading 8543 includes electronic music modules, to which the subject sound devices are akin. However, we note that musical mechanisms are also mentioned in the ENs to the music box provision, heading 9208, HTSUS, which states:

> Articles which incorporate a musical mechanism but which are essentially utilitarian or ornamental in function (for example, clocks, miniature wooden furniture, glass vases containing artificial flowers, ceramic figurines) **are not** regarded as musical boxes within the meaning of this heading. These articles are classified in the same headings as the corresponding articles not incorporating a musical mechanism (emphasis in original).
>
> Also, articles such as wristwatches, cups and greeting cards containing electronic musical modules **are not** regarded as goods of this heading. Such articles are classified in the same headings as the corresponding articles not incorporating such modules (emphasis in original).

Customs has recognized the treatment of such microchips by the World Customs Organization ("WCO") (*i.e.*, that articles containing such chips should be classified in the same headings as the corresponding articles not incorporating a musical mechanism) in several rulings: Headquarters Ruling Letter (HQ) 958397, dated December 19, 1995; HQ 959552, dated November 22, 1996; HQ 959043, dated April 11, 1997, and HQ 959403, dated April 11, 1997. In each of those rulings Customs noted that:

> In 1989, anticipating classification problems with respect to merchandise containing such musical mechanisms, the Customs Cooperation Council or CCC (now the World Customs Organization or WCO) provided guidance which Customs has long followed. With electronic chips having become relatively inexpensive and simple to install in a wide variety of products, the CCC suggested that merchandise containing battery-operated chips with speakers, should be classified in the same headings as the corresponding articles not incorporating such modules.

In light of the above, the intent of the drafters of the international Harmonized System was to take no notice of sound microchips, whether they produce musical or other sounds, in classifying goods that contain them. By application of Note 3 to Section XVI, and in accordance with the above guidance of the WCO, we believe the Sound Spa is a composite machine whose principal function is provided by the clock radio, not the sound microchip. Therefore, at GRI 1, the instant article is classified as a clock radio in heading 8527. Heading 8543 and the microchip are eliminated from further consideration in classifying the merchandise at issue.

Classification of the subject article within subheadings 8527.13 or 8527.19, HTSUS, has been suggested. Included within heading 8527, HTSUS, is "[r]eception apparatus * * * whether or not combined, in the same housing, with sound recording or reproducing apparatus or a clock[.]" Radiobroadcast reception apparatus are separated between apparatus capable of operating without an external source of power (subheadings 8527.12 through 8527.19, HTSUS) and apparatus incapable of operating without an external source of power (subheadings 8527.21 through 8527.29, HTSUS). In the first category are pocket sized radio cassette players (subheading 8527.12.00, HTSUS), other apparatus combined with sound recording or reproducing apparatus (subheading 8527.13, HTSUS), and other (than the above)(subheading 8527.19, HTSUS).

The "Deluxe Sound Therapy Relaxation System" is not a pocket sized radio cassette player, so subheading 8527.12.00, HTSUS, is inapplicable. Subheading 8527.13, HTSUS, is also inapplicable because it provides for apparatus combined with sound recording or reproducing apparatus. As noted above, the microchip is not a sound reproducing device of heading 8527 because it is classified in heading 8543, HTSUS. Thus, subheading 8527.13 does not describe the merchandise. The goods are specifically and completely described in the residual provision, subheading 8527.19, as a radiobroadcast receiver combined with a clock.

Subheading 8527.19 incorporates all radios combined with other articles of the one-dash provision at issue. Of those apparatus captured in subheading 8527.19, subheading 8527.19.10 covers those, in pertinent part, valued not over $40 each, incorporating a clock or clock-timer, and not in combination with any other article. By operation of Note 3 to Section XVI, we find that the clock radio is specifically described in subheading 8527.19.10, HTSUS.

Holding:

The Deluxe Sound Therapy Relaxation System is classifiable under subheading 8527.19.10, HTSUS, which provides for other reception apparatus for radiotelephony combined with sound recording or reproducing apparatus, valued not over $40 each, incorporating a clock or clock-timer, not in combination with any other article, and not designed for motor vehicle installation.

Effect on Other Rulings:

NY C88482 is modified as it pertains to the Deluxe Sound Therapy Relaxation System.

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED REVOCATION OF CUSTOMS RULING LETTER AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF PINZGAUER MOTOR VEHICLES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of ruling letter and treatment relating to the classification of Pinzgauer motor vehicles.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling letter pertaining to the tariff classification of Steyr-Daimler-Puch Fahrzeugtechnik Company, Pinzgauer models 710M and 712M, and revoke any treatment previously accorded by the Customs Service to substantially identical transactions. Comments are invited on the correctness of the intended action.

DATE: Comments must be received on or before June 30, 2000.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: General Classification Branch, 1300 Pennsylvania Avenue. N.W., Washington, D.C. 20229. Comments submitted may be inspected at the same location during regular business hours.

FOR FURTHER INFORMATION CONTACT: Benjamin J. Bornstein, General Classification Branch, (202) 927–1675.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective.

Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility.**" These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. §1484) the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that Customs intends to revoke a ruling letter pertaining to the tariff classification of Steyr-Daimler-Puch Fahrzeugtechnik Company, Pinzgauer motor vehicles, models 710M and 712M. Although in this notice Customs is specifically referring to one ruling, NY F83367, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing data bases for rulings in addition to the one identified. No further rulings have been found. This notice will cover any rulings on this merchandise which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise the Customs Service during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs intends to revoke any treatment previously accorded by the Customs Service to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States (HTSUS). Any person involved in substantially identical transactions should advise Customs during this notice period. An importer's failure to advise the Customs Service of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or their agents for importations of merchandise subsequent to this notice.

In NY F83367, dated February 2, 2000, the classification of merchandise referred to as Pinzgauer motor vehicles, models 710M and 712M, was determined to be classifiable under subheading 8703.23.00, HTSUS, which provides for, "Motor cars and other motor vehicles principally designed for the transport of persons (other than those of heading 8702), including station wagons and racing cars: Other vehicles, with spark-ignition internal combustion reciprocating piston engine: Of a cylinder capacity exceeding 1,500 cc but not exceeding 3,000 cc: Other: Used."

This ruling letter is set forth in "Attachment A" to this document. Since the issuance of that ruling, Customs has had an opportunity to review the classification of this merchandise and has determined that the classification set forth in NY F83367 is in error.

Customs, pursuant to 19 U.S.C. 1625(c)(1), intends to revoke NY F83367, and any other ruling not specifically identified, to reflect the proper classification of the merchandise pursuant to the analysis set forth in proposed Headquarters Ruling Letter (HQ) 964064, which is set forth as "Attachment B" to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by the Customs Service to substantially identical transactions. Before taking this action, consideration will be given to any written comments timely received.

Dated: May 11, 2000.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, February 22, 2000.

CLA-2-87:RR:NC:MM:101 F83367
Category: Classification
Tariff No. 8703.23.0090

MR. WILLY BERCHTOLD
MAGNUM TRUCKS, LLC
904 N. Garland Ave.
Fayetteville, AR 72701

Re: The tariff classification of a 1971–1975 Steyr-Puch Pinzgauer Model 710 & Model 712 Truck from Austria.

DEAR MR. BERCHTOLD:

In your letter dated February 15, 2000, you requested a tariff classification ruling. You submitted photographs of a 1971–1975 Steyr-Puch Pinzgauer Model 710 & Model 712 Truck. These used trucks were built by Steyr-Daimler-Puch in Austria with the intent

to carrying 8 persons, including the driver, on the 710 Model and 12 persons, including the driver, on the 712 Model.

The truck is primarily used by the Swiss military for the transport of persons. It has two bucket seats in the front cab and padded vinyl bench seats in the back.

You state that the intended use of these vehicles will be for the transport of persons on the road and for recreational use such as camping, hunting, "off-roading", or just as a military collector's vehicle.

Both Models 710 & 712 have the following features:

- 2.5 liter, gasoline, 4-cylinder, air cooled, 90 hp spark-ignition engine.
- five forward gears transmission.
- seatbelts for only the two front passengers.
- the bench seats are not removable.
- there is a heater system (no air conditioning) for all passengers, and
- there is no storage compartment under the bench seats.

The applicable subheading for the 1971–1975 Steyr-Puch Pinzgauer Model 710 & Model 712 Truck will be 8703.23.0090, Harmonized Tariff Schedule of the United States (HTS), which provides for Motor cars and other motor vehicles principally designed for the transport of persons (other than those of heading 8702), including station wagons and racing cars: Other vehicles, with spark-ignition internal combustion reciprocating piston engine: Of a cylinder capacity exceeding 1,500 cc but not exceeding 3,000 cc: Other: Used. The rate of duty will be 2.5% ad valorem.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Robert DeSoucey at 212–637–7035.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:GC 964046 BJB
Category: Classification
Tariff No. 8702.90.60

MR. WILLY BERCHTOLD
MAGNUM TRUCKS LLC
904 North Garland Avenue
Fayetteville, AR 72701

Re: NY F83367 Revoked; Pinzgauer motor vehicles; passengers; models 710M and 712M.

DEAR MR. BERCHTOLD:

This is in reference to NY F83367, which the Director of Customs National Commodity Specialist Division, New York, issued to you on February 22, 2000. This ruling concerned the classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of "Pinzgauer" trucks (models 710M and 712M), manufactured by the Steyr-Daimler-Puch Fahrzeugtechnik Company.

We have reviewed the decision in NY F83367 and have determined that the classification of these two models is in error. This ruling revokes NY F83367.

Facts:

The articles in question are motor vehicles manufactured by the Steyr-Daimler-Puch Fahrzeugtechnik Company of Austria, models 710M and 712M. The motor vehicles are

trucks. Model 710M ("710M"), a 4x4, carries 10 passengers, including driver. Model 712M ("712M"), a 6x6, carries 14 passengers, including driver. Both trucks have two bucket seats located in the front cab (one for the driver and one for an additional passenger). These trucks have been used by the Swiss military for the transport of persons over mountainous terrain.

You stated that the vehicles are intended for recreational use such as camping, hunting, "off-roading," or as a military collector's vehicle.

Both models 710M and 712M have the following features:

- 2.5 liter, gasoline, 4-cylinder, air cooled, 90 hp spark-ignition engines;
- five forward gear transmission;
- seatbelts for only the front two passengers;
- non-removable bench seats;
- vehicle-wide heating for all passengers (no air conditioning);
- no storage compartment under the bench seats (although gear may be stored there); and
- auxiliary lighting.

The back section has parallel bench seats along the length of the compartment. These bench seats have padded backrests and seats for passenger comfort. The benches on both sides may be folded down to provide a secondary platform surface which spans the length of the compartment and most of its width.

Both the 710M and the 712M are rear wheel driven. Four wheel drive may be engaged on both units, and 6 wheel drive may be engaged on the 6x6 712 M.

Issue:

Whether the Pinzgauer motor vehicles, models 710M and 712M, are provided for under heading 8702, HTSUS, as motor vehicles for the transport of ten or more persons; under heading 8703, HTSUS, as motor vehicles principally designed for the transport of persons; or under heading 8704, HTSUS, which describes motor vehicles for the transport of goods.

Law and Analysis:

Classification of merchandise under the HTSUS is in accordance with the General Rules of Interpretation (GRIs). Under GRI 1, HTSUS, goods are to be classified according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes may be utilized. The Explanatory Notes (ENs), although not dispositive or legally binding, provide a commentary on the scope of each heading of the HTSUS, and are generally indicative of the proper interpretation of these headings. Customs believes the ENs should always be consulted. *See* T.D. 98–80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

The HTSUS headings and subheadings under consideration are as follows:

8702	Motor vehicles for the transport of ten or more persons, including the driver:
* * * * * * *	
8702.90.	Other * * *
8702.90.60	Other * * *
* * * * * * *	
8703	Motor cars and other motor vehicles principally designed for the transport of persons (other than those of heading 8702), including station wagons and racing cars:
* * * * * * *	
8704	Motor vehicles for the transport of goods:
* * * * * * *	

In NY F83367, the subject vehicles were held to be classifiable under heading 8703, HTSUS, based upon the mistaken understanding that the models 710M and 712M were "principally designed for the transport of persons (other than those of heading 8702), including station wagons and racing cars[.]" In fact, at least 10 passengers, including the driver, may be carried in these vehicles.

Models 710M and 712M are provided for at heading 8702, HTSUS. The express language of heading 8702 provides for a motor vehicle with a capacity to transport ten or more per-

sons including the driver. The fact that the subject vehicles can transport at least 10 passengers has been corroborated by documentation available in the public domain on several Internet websites. Insofar as the models 710M and 712M are provided for in heading 8702, HTSUS, they are not provided for in heading 8703, HTSUS. Specifically, the language in heading 8703 stipulates that vehicles classifiable there, must be, "other than those of heading 8702 * * *."

The vehicles may be used for the transport of passengers or goods. However, if they are used for passengers, little room is left for cargo. The floor area located in the back sections of the models 710M and 712M is narrowly configured, thus limiting the quantity of goods that might be carried. When configured for transporting goods, the load platform for goods consists of using the backs of the seats. This is, however, a "secondary platform" other than the actual floor of the vehicles, but similar to situations in which the backs of seats in station wagons are used to transport goods. Further, in both the models 710M and 712M, much of the space located underneath the "secondary platform" area is blocked by the presence of the backrests, thereby further curtailing cargo storage space. Therefore, we conclude that the vehicles are principally designed for the transport of persons.

This ruling applies to Pinzgauer models 710M and 712M only. Other model vehicles exist and should be classified on a case-by-case basis according to their design characteristics.

Holding:

Under the authority of GRI 1, the Pinzgauer trucks, models 710M and 712M are provided for in heading 8702, HTSUS. They are classifiable in subheading 8702.90.60, HTSUS, which provides for "[m]otor vehicles for the transport of ten or more persons, including the driver: * * * Other * * * Other."

NY F83367, dated February 22, 2000, is revoked.

JOHN DURANT,
Director,
Commercial Rulings Division.

REVOCATION OF CUSTOMS RULING LETTERS & TREATMENT RELATING TO TARIFF CLASSIFICATION OF MESH WARNING VESTS

AGENCY: U.S. Customs Service, Department of Treasury.

ACTION: Notice of revocation of tariff classification ruling letters.

SUMMARY: Pursuant to Section 625(c)(1) of the Tariff Act of 1930, as amended, (19 U.S.C. 1625(c)), this notice advises interested parties that Customs is revoking three rulings pertaining to the tariff classification of warning vests made from polyvinyl chloride (PVC) dipped polyester fiber mesh fabric and any treatment previosuly accorded by Customs to substantially identical merchandise. Notice of the proposed revocations was published in the CUSTOMS BULLETIN of April 12, 2000, Vol. 34, No. 15. No comments were received.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after July 31, 2000.

FOR FURTHER INFORMATION CONTACT: Mary Beth Goodman, Textile Branch, (202) 927–1368.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L.

103–182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. § 1484) the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

In NY 848018, dated December 21, 1989, concerning the tariff classification of a safety vest made from PVC dipped polyester fiber mesh fabric, the product was erroneously classified under subheading 6210.50.1010 of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) as an other made up garment of fabrics that have been coated, covered, or impregnated with plastics. In HQ 088549, dated September 4, 1991, concerning the tariff classification of a safety vest made from knit polyester fiber mesh fabric coated with polyvinyl chloride, the product was erroneously classified under subheading 6117.80.0035, HTSUSA, the provision for other made up clothing accessories, knitted or crocheted. In HQ 950212, dated September 4, 1991, concerning the tariff classification of a warning vest made from PVC dipped, polyester fiber mesh fabric, the product was erroneously classified under subheading 6217.10.0030, HTSUSA, the provision for other made up non-knit clothing accessories. The items under review are described as being embedded or completely covered on both sides with plastics, and therefore, the correct tariff number for all of these products should be under subheading 3926.20.9050 of the HTSUSA as a clothing accessory of plastics.

Customs, pursuant to 19 U.S.C. 1625(c)(1), is revoking NY 848018, HQ 088549, HQ 950212 and any other ruling not specifically identified on identical or substantially similar merchandise to reflect the proper classification within the HTSUSA pursuant to the analysis set forth in Headquarters Rulings (HQ) 963614 (*see* "Attachment A" to this document); HQ 963615 (*see* "Attachment B" to this document); HQ 963616 (*see* "Attachment C" to this document). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by Customs to substantially identical merchandise.

As stated in the proposed notice, this revocation will cover any rulings on this issue which may exist but have not been specifically identi-

fied. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the issue subject to this notice, should have advised Customs during the notice period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(2)), Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, have been the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations involving the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States. Any person involved in substantially identical transactions should have advised Customs during the notice period. An importer's reliance on a treatment of substantially identical transactions or on a specific ruling concerning the merchandise covered by this notice which was not identified in this notice may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations subsequent to the effective date of this final decision.

Dated: May 16, 2000.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, May 16, 2000.

CLA–2 RR:CR:TE 963614 MBG
Category: Classification
Tariff No. 3926.20.9050

MR. JAY SHYNN
KOTAP AMERICA LTD.
10 Bayview Avenue
Lawrence, NY 11559

Re: Classification of warning vest made from PVC dipped polyester fiber mesh fabric; Revocation of NY 848018.

DEAR MR. SHYNN:

On December 21, 1989, Customs issued NY Ruling Letter (NY) 848018 to your company, Kotap America Ltd., regarding the tariff classification of a warning vest coated on both sides due to polyvinyl chloride (PVC) dipping. The warning vest was originally classified under subheading 6210.50.1010 of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). Upon review, Customs has determined that the warning vest was erroneously classified under subheading 6210.50.1010 HTSUSA. The correct classification for the product should be under subheading 3926.20.9050, HTSUSA, based on classifi-

cation as a clothing accessory of plastics. This ruling revokes NY 848018 for the reasons stated below.

Pursuant to section 625(c), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)), notice of the proposed revocation of NY 848018 was published on April 12, 2000, in the CUSTOMS BULLETIN, Volume 34, Number 15. No comments were received.

Facts:

The garment under consideration is a warning vest used by construction workers. The vest is made of mesh, PVC dipped, polyester base fabric. The garment is an orange fluorescent color and is flame retardant. The reflector on the chest and back is PVC, and the binding around the neck, arm holes, and surrounding the entire vest is vinyl. At the side bottom of the vest on each side is an elastic adjustable band. The closure at the back of the vest is made of a velcro-like material. The vest is imported from Korea.

Issue:

What is the proper classification for a safety vest coated with vinyl?

Law and Analysis:

Classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied. The *Harmonized Commodity Description and Coding System, Explanatory Notes* (ENs), represent the official interpretation of the Harmonized System at the international level (for the 4 digit headings and the 6 digit subheadings) and facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRIs.

Legal Note 2(a)(3) to Chapter 59, HTSUSA, states that Heading 5903 applies to:

> Textile fabrics impregnated, coated, covered or laminated with plastics, whatever the weight per square meter and whatever the nature of the plastic material (compact or cellular) *other than*:
>
> * * * * * * *
>
> (3) Products in which the textile fabric is either completely embedded in plastic or entirely coated or covered on both sides with such material, provided that such coating or covering can be seen with the naked eye with no account being taken of any resultant change in color (chapter 39). (emphsis added).

The intent of Note 2(a)(3) to Chapter 59 is to classify those products "embedded in" or "completely covered" with plastics under the headings that provide for plastics or articles of plastics because they have acquired the characteristics of plastics. The fabric comprising the article under consideration is entirely coated or covered on all sides with plastics and, therefore, that fabric would be excluded from classification in chapter 59, HTSUSA. Since the fabric from which the vest is constructed is classifiable as a plastics good in chapter 39, the vest is classifiable as an article of plastics. Thus, pursuant to GRI 1, the warning vest is classified in subheading 3926.20.9050 HTSUSA, which provides for other apparel and clothing accessory articles of plastics.

Holding:

NY 848018 dated December 21, 1989, is hereby revoked. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

The instant warning vest, which is made from a knit textile fabric that has been completely covered or coated with plastics, is classified in subheading 3926.20.9050, HTSUSA, which provides for "Other articles of plastics and articles of other materials of headings 3901 to 3914: Articles of apparel and clothing accessories (including gloves): Other: other: other." The general column one rate of duty is 5 percent *ad valorem*.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, May 16, 2000.

CLA-2 RR:CR:TE 963615 MBG
Category: Classification
Tariff No. 3926.20.9050

MR. JOHN CANELLAKIS
VICE PRESIDENT
BEIJING TRADE EXCHANGE, INC.
701 E. Street, S.E.
Washington, DC 20003

Re: Classification of safety vest made from knit polyester fiber mesh fabric coated with polyvinyl chloride; Revocation of HQ 088549.

DEAR MR. CANELLAKIS:

On September 4, 1991, Customs issued HQ 088549 to your company, Beijing Trade Exchange, Inc., regarding the tariff classification of a safety vest coated with polyvinyl chloride. The safety vest was originally classified under subheading 6117.80.0035 of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). Upon review, Customs has determined that the safety vest was erroneously classified under subheading 6117.80.0035, HTSUSA, under the provision for other made up clothing accessories. The correct classification for the product should be under subheading 3926.20.9050, HTSUSA, based on classification as a clothing accessory of plastics. This ruling revokes HQ 088549 for the reasons stated below.

Pursuant to section 625(c), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)), notice of the proposed revocation of HQ 088549 was published on April 12, 2000, in the CUSTOMS BULLETIN, Volume 34, Number 15.

Facts:

The item under consideration is a safety vest made from knit polyester fiber mesh fabric coated on both sides with polyvinyl chloride. A cloth binding covers all exposed edges and adjustable hook and loop fasteners are located in the middle of each full side and frontal opening. The body of the vest is fluorescent orange and reflective plastic strips extend over the shoulders from the bottom hems. The vest is designed to be worn for visibility.

Issue:

What is the proper classification of the merchandise?

Law and Analysis:

Classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied. The Explanatory Notes (EN) to the *Harmonized Commodity Description and Coding System*, represent the official interpretation of the Harmonized System at the international level (for the 4 digit headings and the 6 digit subheadings) and facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRIs.

Legal Note 2(a)(3) to Chapter 59, HTSUSA, states that Heading 5903 applies to:

> Textile fabrics impregnated, coated, covered or laminated with plastics, whatever the weight per square meter and whatever the nature of the plastic material (compact or cellular) *other than*:
>
> * * * * * * *
>
> (3) Products in which the textile fabric is either completely embedded in plastic or entirely coated or covered on both sides with such material, provided that such coating or covering can be seen with the naked eye with no account being taken of any resultant change in color (chapter 39). (emphasis added).

The intent of Note 2(a)(3) to Chapter 59 is to classify those products "embedded in" or "completely covered" with plastics under the headings that provide for plastics or articles

of plastics because they have acquired the characteristics of plastics. The fabric comprising the article under consideration is entirely coated or covered with plastics and, therefore, that fabric would be excluded from classification in chapter 59, HTSUSA. Since the fabric from which the vest is constructed is classifiable as a plastics good in chapter 39, the vest is classifiable as an article of plastics. Thus, pursuant to GRI 1, the warning vest is classified in subheading 3926.20.9050 HTSUSA, which provides for other apparel and clothing accessory articles of plastics.

Holding:

HQ 088549 dated September 4, 1991, is hereby revoked. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

The instant warning vest, which is made from a knit textile fabric that has been completely covered or coated with plastics, is classified in subheading 3926.20.9050, HTSUSA, which provides for "Other articles of plastics and articles of other materials of headings 3901 to 3914: Articles of apparel and clothing accessories (including gloves): Other: other: other." The general column one rate of duty is 5 percent *ad valorem*.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, May 16, 2000.
CLA-2 RR:CR:TE 963616 MBG
Category: Classification
Tariff No. 3926.20.9050

MR. JAY SHYNN
KOTAP AMERICA LTD.
10 Bayview Avenue
Lawrence, NY 11559

Re: Classification of warning vest made from nylon mesh fabric coated on both sides with plastics; Revocation of HQ 950212.

DEAR MR. SHYNN:

On September 4, 1991, Customs issued HQ 950212 to your company, Kotap America Ltd., regarding the tariff classification of a warning vest made from polyvinyl chloride (PVC) dipped, polyester mesh fabric. The warning vest was originally classified under subheading 6217.10.0030 of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). Upon review, Customs has determined that the warning vest was erroneously classified under subheading 6217.10.0030, HTSUSA, under the provision for other made up clothing accessories. The correct classification for the product should be under subheading 3926.20.9050, HTSUSA, based on classification as a clothing accessory of plastics. This ruling revokes HQ 950212 for the reasons set forth below.

Pursuant to section 625(c), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)), notice of the proposed revocation of HQ 950212 was published on April 12, 2000, in the CUSTOMS BULLETIN, Volume 34, Number 15.

Facts:

The article at issue is a warning vest made from PVC dipped, polyester mesh fabric. The vest is completely covered on both sides by the PVC dipping. The vest is florescent orange in color and flame retardant. The reflector on the chest is made from PVC while the binding around the neck opening, arm holes, and borders is of vinyl. There is an elastic adjustable band at the bottom sides of the vest, and a hook and loop closure at the back.

Issue:

What is the proper classification for a safety vest coated with polyvinyl chloride?

Law and Analysis:

Classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied. The *Harmonized Commodity Description and Coding System, Explanatory Notes* (ENs), represent the official interpretation of the Harmonized System at the international level (for the 4 digit headings and the 6 digit subheadings) and facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRIs.

Legal Note 2(a)(3) to Chapter 59, HTSUSA, states that Heading 5903 applies to:

> Textile fabrics impregnated, coated, covered or laminated with plastics, whatever the weight per square meter and whatever the nature of the plastic material (compact or cellular) *other than*:
>
> * * * * * * *
>
> (3) Products in which the textile fabric is either completely embedded in plastic or entirely coated or covered on both sides with such material, provided that such coating or covering can be seen with the naked eye with no account being taken of any resultant change in color (chapter 39). (emphasis added).

The intent of Note 2(a)(3) to Chapter 59 is to classify those products "embedded in" or "completely covered" with plastics under the headings that provide for plastics or articles of plastics because they have acquired the characteristics of plastics. The fabric comprising the article under consideration is entirely coated or covered with plastics and, therefore, that fabric would be excluded from classification in chapter 59, HTSUSA. Since the fabric from which the vest is constructed is classifiable as a plastics good in chapter 39, the vest is classifiable as an article of plastics. Thus, pursuant to GRI 1, the warning vest is classified in subheading 3926.20.9050 HTSUSA, which provides for other apparel and clothing accessory articles of plastics.

Holding:

HQ 950212 dated September 4, 1991, is hereby revoked. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

The instant warning vest, which is made from a knit textile fabric that has been completely covered with plastics, is classified in subheading 3926.20.9050, HTSUSA, which provides for "Other articles of plastics and articles of other materials of headings 3901 to 3914: Articles of apparel and clothing accessories (including gloves): Other: other: other." The general column one rate of duty is 5 percent *ad valorem*.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

MODIFICATION OF CUSTOMS RULING AND TREATMENT RELATING TO THE ELIGIBILITY OF FISHING FLIES FOR THE DUTY ALLOWANCE UNDER SUBHEADING 9802.00.80, HTSUS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Modification of ruling letter and treatment pertaining to the eligibility for the duty allowance under subheading 9802.00.80, Harmonized Tariff Schedule of the United States (HTSUS), of fishing flies.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying a ruling pertaining to the eligibility for the duty allowance under subheading 9802.00.80, HTSUS, of fishing flies. Notice of the proposed modification was published in the CUSTOMS BULLETIN, Vol. 34, No. 14.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after July 31, 2000.

FOR FURTHER INFORMATION CONTACT: Burton L. Schlissel, Commercial Rulings Division (202) 927–1034.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–82, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. §1484) the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met. Pursuant to Customs obligations, a notice of proposed modification of Headquarters Ruling Letter (HRL) 559756, dated August 7, 1996, was published in Vol. 34, No. 14, of the CUSTOMS BULLETIN, dated April 5, 2000. No comments were received in response to this notice.

As stated in the proposed notice, this modification action will cover any rulings on this issue, which may exist but have not been specifically identified. Any party who has received an interpretative ruling or decision (*i.e.*, ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should have advised Customs during the notice period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 CFR 1625(c)(2)) by section 623 of Title VI, Customs is revoking any treatment previously accorded by the Customs Service to substantially identical transactions. This treatment may, among other reasons, have been the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States (HTSUS). Any person involved in substantially identical transactions should have advised Customs during the notice period. An importer's reliance on a treatment of substantially identical transactions or on a specific ruling concerning the merchandise covered by this notice which was not identified in this notice may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations subsequent to the effective date of this final decision.

In HRL 559756, Customs ruled that an allowance in duty under subheading 9802.00.80, HTSUS, would not be allowed for the cost or value of U.S.-origin chicken feathers exported abroad to make fishing flies. In view of a stipulated judgement in *Umpqua Feather Merchants, Inc., v. United States (Court of International Trade Case No. 98–01–00075)*, and after further review of the issue, Customs is of the opinion that the decision in HRL 559756 regarding the eligibility of the feathers for a duty allowance is in error and should be modified.

Customs, pursuant to 19 U.S.C. 1625(c)(1), is modifying HRL 559756 and revoking any other ruling not specifically identified, to permit an allowance in duty under subheading 9802.00.80, HTSUS, for the cost or value of U.S.-origin chicken feathers based on transactions which are substantially identical to the operations in HRL 559756 and *Umpqua Feather Merchants, Inc., v. United States*. HRL 561608, which permits the duty allowance under subheading 9802.00.80, for the cost or value of the chicken feathers, is set forth as an attachment to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by Customs to substantially identical transactions.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN.

Dated: May 17, 2000.

MYLES HARMON,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, May 17, 2000.

CLA–2 RR:CR:SM 561608 BLS
Category: Classification
Tariff No. 9802.00.80

PORT DIRECTOR
511 N.W. Broadway
Portland, OR 97209

Re: Modification of HRL 559756; eligibility of fishing flies for the partial duty exemption under heading 9802.00.80, HTSUS; NY 816209; 19 CFR 10.14; 19 CFR 10.16; *Umpqua Feather Merchants, Inc. v. United States*.

DEAR SIR:

This is in reference to a letter dated December 28, 1999, from counsel on behalf of Umpqua Feather Merchants, Inc., requesting that Headquarters Ruling Letter (HRL) 559756 dated August 7, 1996 (which was addressed to your office), be revoked or modified in light of the stipulated judgement in *Umpqua Feather Merchants, Inc. v. United States* (Court of International Trade Case No. 98–01–00075).

Facts:

U.S.-origin chicken capes and saddles (chicken skin) and U.S.-origin thread are exported to Sri Lanka, Thailand, or India. In the country of assembly, the feathers are plucked from the capes and saddles, sorted by color and size, and clipped or trimmed to aid in the assembly process. The thread and feathers are wound around a Japanese origin hook and body (fur, rabbit skins or deer hair) and assembled in that manner to form the completed fly. For some types of flies, a small amount of glue may be added to the thread after completion of the fly to make it more durable.

Issue:

Whether, under the facts presented, an allowance in duty is warranted under subheading 9802.00.80, Harmonized Tariff Schedule of the United States (HTSUS), for the cost or value of the feathers.

Law and Analysis:

Subheading 9802.00.80, HTSUS, provides a partial duty exemption for:

> Articles, except goods of heading 9802.00.90, assembled abroad in whole or in part of fabricated components, the product of the United States, which (a) were exported in condition ready for assembly without further fabrication, (b) have not lost their physical identity in such articles by change in form, shape, or otherwise, and (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process, such as cleaning, lubricating and painting.

All three requirements of subheading 9802.00.80, HTSUS, must be satisfied before a component may receive a duty allowance. An article entered under HTSUS subheading

9802.00.80 is subject to duty upon the full value of the imported article, less the cost or value of the U.S. components assembled therein, provided there has been compliance with the documentary requirements of section 10.24, Customs Regulations (19 CFR 10.24).

Section 10.14, Customs Regulations (19 CFR 10.14(a)), states in part that:

> The components must be in condition ready for assembly without further fabrication at the time of their exportation from the United States to qualify for the exemption. Components will not lose their entitlement to the exemption by being subjected to operations incidental to the assembly either before, during or after their assembly with other components.

Section 10.16(a), Customs Regulations (19 CFR 10.16(a)), provides that the assembly operation performed abroad may consist of any method used to join or fit together solid components, such as welding, soldering, riveting, force fitting, gluing, laminating, sewing or the use of fasteners. Operations incidental to the assembly process are not considered further fabrication operations, as they are of a minor nature and cannot always be provided for in advance of the assembly operations. *See* 19 CFR 10.16(b). However, any significant process operation, or treatment whose primary purpose is the fabrication, completion, physical or chemical improvement of a component precludes the application of the exemption under subheading 9802.00.80, HTSUS, to that component. *See* 19 CFR 10.16(c).

NY 816209

In NY 816209 dated November 9, 1995, Customs found that a duty allowance may be granted under subheading 9802.00.80, HTSUS, for the cost or value of the feathers and of the U.S.-origin thread, upon compliance with the documentary requirements of 19 CFR 10.24.

HRL 559756—Modification of NY 816209

By memorandum dated March 20, 1996, your office requested that we review NY 816209. Upon reconsideration, we disallowed the duty allowance for the feathers. In HRL 559756 we stated that the pre-assembly operation of plucking the feathers from the chicken capes and saddles abroad was a significant process which was not incidental to the assembly operation, but constituted a finishing step in the fabrication of the feather components. Therefore, we modified NY 816209 and held that the feathers were not eligible for the duty allowance under subheading 9802.00.80, HTSUS. (We affirmed NY 816209 to the extent that the decision held that the fishing flies were eligible for a duty allowance based on the cost or value of the fully fabricated U.S.-origin thread.)

Umpqua Feather Merchants, Inc., v. United States

On March 23, 1999, the parties in *Umpqua Feather Merchants, Inc., v. United States* (Court of International Trade Case No. 98–01–00075), agreed to a stipulated judgement in favor of plaintiff, permitting a duty allowance under subheading 9802.00.80, HTSUS, for the cost or value of chicken feather components under circumstances very similar to those in NY 816209. The entries subject to the court case were re-liquidated in accordance with the stipulated judgement.

Customs Action

In view of the stipulated judgement in *Umpqua Feather Merchants*, and, after further consideration of this issue, Customs has decided that the decision in HRL 559756 to deny a duty allowance to the chicken feather components is in error. Accordingly, HRL 559756 is modified to permit a duty allowance under subheading 9802.00.80, HTSUS, for the cost or value of the chicken feathers.

Holding:

Chicken feather components used in making fishing flies abroad are fully fabricated and in condition ready for assembly when exported to Sri Lanka, Thailand, or India.

Therefore, based on the facts of this case, an allowance in duty will be permitted under subheading 9802.00.80, HTSUS, for the cost or value of the feather components, provided the documentary requirements of 19 CFR 10.24 are satisfied. As a result, HRL 559756 is hereby modified.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

MYLES HARMON
(for John Durant, Director,
Commercial Rulings Division.)

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10278

Chief Judge

Gregory W. Carman

Judges

Jane A. Restani
Thomas J. Aquilino, Jr.
Richard W. Goldberg
Donald C. Pogue
Evan J. Wallach
Judith M. Barzilay
Delissa Anne Ridgway
Richard K. Eaton

Senior Judges

James L. Watson

Herbert N. Maletz

Nicholas Tsoucalas

R. Kenton Musgrave

Clerk

Leo M. Gordon

Decisions of the United States Court of International Trade

(Slip Op. 00–41)

ELKEM METALS CO., ET AL., PLAINTIFFS *v.*
UNITED STATES OF AMERICA, ET AL., DEFENDANTS

Consolidated Court No. 99–10–00628

(Dated April 17, 2000)

Baker & Botts (Kirk K. Van Tine); Eckert Seamans Cherin & Mellott (Mary K. Austin), for Plaintiff.

Lyn M. Schlitt, General Counsel, U.S. International Trade Commission; *James A. Toupin*, Assistant General Counsel, U.S. International Trade Commission; *Michael Haldenstein*, Attorney, U.S. International Trade Commission, for Defendant.

MEMORANDUM OPINION AND ORDER

EATON, *Judge:* The Court has exclusive jurisdiction over this consolidated action, commenced under 19 U.S.C. § 1516a(a) and 28 U.S.C. § 1581(c), in which the Plaintiffs contest the Defendant United States International Trade Commission's ("ITC") negative injury determination upon reconsideration in *Ferrosilicon from Brazil, China, Kazakhstan, Russia, Ukraine, and Venezuela*, 64 Fed. Reg. 47,865 (Sept. 1, 1999).

Before the Court is Plaintiff Elkem Metals Company's ("Elkem") Motion to Compel Production of Documents ("Motion to Compel") contained in the administrative record ("Record"). According to the documents submitted by the parties at the December 13, 1999 filing of the Record, the ITC withheld all of the items contained on certified list ("CL") No. 3 claiming that they represented the "privileged portion" of the Record.[1] (Def.'s Opp'n. Mot. Compel at 1.) On December 22, 1999, Elkem filed a request with the ITC for a list of the legal privileges asserted, and an explanation of how these privileges applied to each individual item contained on CL No. 3. The ITC responded on January 14, 2000, alleging that twenty-four of the items listed in CL No. 3 were pro-

[1] The Record in the case at bar is composed of several "certified lists" that catalog various "items" that the ITC reviewed in rendering its negative injury determination.

tected by the deliberative process privilege, and that twenty-one of those items were also protected by the attorney-client privilege and the attorney work-product privilege.[2]

On February 7, 2000, Elkem filed the instant motion challenging the ITC's assertion of privilege, and requesting production of item nos. 9, 10, 16, 18, 19, and 25 from CL No. 3. Elkem does not "challenge" the ITC's assertion of the attorney-client and the attorney work-product privileges, however, it still opposes the ITC's assertion of the deliberative process privilege and requests production of all of the items listed in its February 7, 2000 Motion To Compel. (Pl.'s Reply Supp. Mot. Compel at 2.)

In its Opposition to Motion to Compel Production of Privileged Documents, the ITC argues that the withheld items are subject to the deliberative process privilege because they contain "predecisional and deliberative documents." (Def.'s Opp'n. Mot. Compel at 10.) The ITC supports this assertion with an affidavit from its Vice Chairman, Marcia E. Miller, which states that the items in question were

> prepared solely for the internal use of the Commission and their staffs, and reflect advisory opinions, discussions of strengths and weaknesses of various arguments, pro-con type analysis, or recommendations that are an integral part of the process by which procedural and final determinations in these investigations were formulated.

(Miller Aff. ¶ 7.) The ITC's assertions, coupled with the attached affidavit from Vice Chairman Miller attesting to the deliberative nature of the documents, effectively invoke the deliberative process privilege. *See NEC Corp. v. United States*, 21 CIT 198, 211, 958 F. Supp. 624, 636 (1997); *Melamine Chemicals v. United States*, 1 CIT 65, 66 (1980); *SCM Corp. v. United States*, 82 Cust. Ct. 351, 359, 473 F. Supp. 798, 799 (1979); *Sprague Electric Co. v. United States*, 81 Cust. Ct. 168, 171, 462 F. Supp 966, 969 (1978). In situations such as the case at bar, where a party has formally invoked the deliberative process privilege, it is proper for the court to conduct an *in camera* review of the withheld documents to determine: (1) whether the items in question contain deliberative material; and (2) whether the government's interest in confidentiality outweighs the litigant's need for public disclosure. *See Zenith Radio Corp. v. United States*, 764 F.2d 1577, 1580–81 (1985); *Chevron Standard, Ltd. v. United States*, 5 CIT 3, 4 (1983); *Armtek Corp. v. United States*, 1996 WL 469015 *2 (W.D.N.Y. June 20, 1996).

After careful consideration of Elkem's present Motion to Compel and its alternative request for *in camera* review, the ITC memorandum in opposition thereto, and all other memoranda and affidavits submitted herein, this Court concludes that an *in camera* review is necessary to confirm the deliberative nature of the withheld items, and to determine

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[2] In its January 14, 2000 response, the ITC stated that item no. 20 of CL No. 3 would be released, thereby narrowing the number of withheld documents from twenty-five to twenty-four.

whether the ITC's interest in confidentiality outweighs Elkem's need for disclosure. Accordingly, it is hereby

1. ORDERED that the ITC is directed to provide the Court with copies of the documents from CL No. 3 listed as item no. 9 (except that the "Recommendation" described in the affidavit of Lyn M. Schlitt dated February 22, 2000 at paragraph 3(a) may be deleted and that the portion of 9(b) consisting of Memorandum GC–94–012 may be deleted, provided, however, that the attachment thereto entitled "Notice of Amended Final Determination of Sales at Less Than Fair Market Value: Ferrosilicon From Brazil" dated February 15, 1994 shall be supplied to the Court), item no. 10 (except for those portions for which no privilege is claimed and except for General Counsel Memorandum GC–v–172), item no. 16 (except for General Counsel Memorandum GC–v–224), item no. 18, item no. 19, and item no. 25; and it is further

2. ORDERED that within thirty (30) days of the entry of this order, the Secretary of the ITC shall prepare and transmit under seal to the Honorable Leo M. Gordon, Clerk of the United States Court of International Trade, a certified copy of the documents listed above.

(Slip Op. 00–42)

DEFENDERS OF WILDLIFE, ET AL., PLAINTIFFS *v.*
PENELOPE D. DALTON, ET AL., DEFENDANTS

Court No. 00–02–00060

[Plaintiffs' Motion for a Temporary Restraining Order and/or Preliminary Injunction denied.]

(Decided April 18, 2000)

Defenders of Wildlife (William J. Snape, III) for Plaintiffs.
David W. Ogden, Acting Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Lucius B. Lau)* for Defendants.

OPINION

I. INTRODUCTION

BARZILAY, *Judge:* The motion before the court challenges the affirmative finding by defendant,[1] Penelope. D. Dalton, that Mexico is in compliance with the International Dolphin Conservation Protection Act's

[1] By delegation, the Secretary of Commerce has given Penelope D. Dalton, in her official capacity as the Assistant Administrator for Fisheries for the National Marine Fisheries Service an organization of the National Oceanic and Atmospheric Administration of the United States Department of Commerce, the authority to render these findings. Throughout the opinion the Court refers to Defendants collectively.

requirements; and therefore, that the embargo against tuna from Mexico's vessels in the Eastern Pacific ocean should be lifted. *See* Notice Concerning Affirmative Finding for Mexico at 1 (filed Apr. 13, 2000). Plaintiffs allege irreparable injury from the likely extinction of three depleted stocks of dolphins. On April 12, 2000, the Court held an evidentiary hearing on the pending motion.[2] On April 14, 2000, the Court issued an order denying the motion.[3] Pursuant to 28 U.S.C. § 2645(c)(2) (1994), this opinion sets forth the facts and reasons for that decision. Since this motion involves an embargo, the court exercises jurisdiction under 28 U.S.C. § 1581(i)(3).

II. BACKGROUND

For reasons that are not fully understood, in the Eastern Pacific Ocean ("EPO" or "ETP") and that area alone, yellowfin tuna swim beneath dolphins. Because dolphins surface for air, fisherman have used the sighting of them to fish for tuna. In the fishing method at issue here, a net is dropped, known as a purse seine, to encircle the dolphins and tuna and when it is brought to the surface any number of dolphins may be caught inside of the netting. While some dolphins may be able to be released alive, others may suffocate by the time a release can be made. Although certain safety devices in the nets have decreased the number of dolphin mortalities associated with the purse seine method, dolphin deaths continue to occur.

Partially in response to the unique association between dolphin and yellowfin tuna in the EPO, Congress passed the Marine Mammal Protection Act ("MMPA") in 1972 (16 U.S.C. § 1361 et. seq.). Congress has amended the MMPA several times, most recently by the International Dolphin Conservation Program Act ("IDCPA") (Pub. L. No. 105–42, 111 Stat. 1122 (1997)). In part, the IDCPA implements the Declaration of Panama, a binding commitment to protect dolphins and other species and to conserve and manage tuna in the EPO. *See* IDCPA § 2(a)(1). Pursuant to section 6 of the IDCPA, the Secretary of State secured a binding international agreement, the International Dolphin Conservation Program ("International Program"), that entered into force on February 15, 1999. The National Marine Fisheries Service ("NMFS"), an organization within the National Oceanic and Atmospheric Administration of the Department of Commerce noticed and requested comments on its proposed rules to implement the IDCPA. *See* 64 Fed. Reg. 31806 (1999). Plaintiffs instituted the present action, in part, to challenge the interim final rule promulgated by the NMFS. *See* 65 Fed. Reg. 30 (2000) (to be codified at 15 C.F.R. § 902 and 50 C.F.R.

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[2] Plaintiffs' objection to paragraph 20 of the Declaration of Frank E. Loy is sustained as to the first sentence only. Defendants' objections to Addenda 1, 2 and 7 are overruled. Defendants' objections to Addenda 3 and 8 are sustained.

[3] The Court is aware of the Federal Circuit's pronouncement that "a district court should refrain from entering an appealable order until the findings of facts and conclusions of law *upon which the district court intends the losing party to base any appeal also are entered*." *See Hybritech, Inc. v. Abbott Labs.*, 849 F.2d 1446, 1450–51 (Fed. Cir. 1988) (emphasis in original). The Court specifically asked the parties at the hearing if this procedure would aid them and both responded affirmatively. The Court also endeavored to issue the written opinion as quickly as possible.

§ 216). Once the Plaintiffs learned of the pending lifting of the embargo on Mexican tuna they brought the motion currently before the Court.

III. Discussion

A preliminary injunction is an extraordinary remedy that should be granted sparingly. *See American Air Parcel Forwarding Co. v. United States*, 1 CIT 293, 298, 515 F. Supp. 47, 52 (1981). Plaintiffs bear "the burden of persuasion, and a heavy burden of producing evidence * * *." *Id.* To prevail, Plaintiffs must show "(1) that [they] will be immediately and irreparably injured; (2) that there is a likelihood of success on the merits; (3) that the public interest would be better served by the relief requested; and (4) that the balance of hardships on all the parties favors the [movant]." *Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed. Cir. 1983) (citing *S.J. Stile Assoc., Ltd. v. Snyder*, 646 F.2d 522, 525 (C.C.P.A. 1981)). While no one factor is necessarily dispositive, "the absence of an adequate showing with regard to any one factor may be sufficient, given the weight or lack of it assigned by the other factors, to justify denial." *See FMC Corp. v. United States*, 3 F.3d 424, 427 (Fed. Cir. 1993) (citation omitted).

A. Irreparable Injury

Plaintiffs allege irreparable injury if three stocks of dolphins become extinct.[4] *See Pls.' Mot. for a Temporary Restraining Order and/or Preliminary Injunction* at 13 ("*Pls.' Br.*"). Plaintiffs have not submitted any evidence, however, that changing the status quo by lifting the embargo on Mexican tuna caught in the EPO will increase the number of dolphin mortalities to the extent that extinction is a possibility. As a matter of fact, Plaintiffs presented no factual evidence that more dolphin deaths would occur as a result of lifting the embargo, but relied on the increase in the permitted number of mortalities contained in the interim rule to argue irreparable injury.[5] It may be that such evidence does not exist, or that by its nature it would be speculative. But the Court cannot issue the relief Plaintiffs request without it.[6]

While Plaintiffs allege that three depleted dolphin stocks will be pushed to extinction, the only evidence they have provided to support this contention is an NMFS report. The report, however, does not state that the dolphin stocks are declining, but rather that two were not recovering at expected rates or at all and that one may be continuing to decline. *See Pls.' Br.* Addendum 6 at 23 (Report to Congress, Southwest Fisheries Science Center, National Marine Fisheries Service, National

[4] These dolphin stocks are the northeastern offshore spotted dolphin, the eastern spinner dolphin and the coastal spotted dolphin.

[5] At the hearing the Court repeatedly asked where the evidence of irreparable injury was in the record. Plaintiffs' counsel could only point to his own belief that irreparable injury would occur.

[6] Throughout the opinion, the Court refers to 5,000 dolphin mortalities as the maximum acceptable number by Congress. *See* IDCPA §§ 2(4), 6. The Court recognizes that Congress required the Secretary of State to seek to secure an international agreement with a commitment to progressively reduce the number of dolphin mortalities to a level approaching zero. *See* IDCPA § 6. However, it is clear that Congress authorized, at least for the first year of any agreement's operation, up to 5,000 dolphin mortalities. Thus, one way to show irreparable injury would be for Plaintiffs to provide evidence that this number would be exceeded, or that a specific stock's assigned mortality limits would be exceeded.

Oceanic and Atmospheric Administration, U.S. Department of Commerce (March 25, 1999)). For purposes of establishing irreparable injury the NMFS report establishes only that three dolphin stocks are depleted. It does not provide any information on the effects that ending the embargo will have.

Plaintiffs have also attempted to show irreparable injury through affidavits. None of the affidavits Plaintiffs submitted contain evidence that the three depleted dolphin species will be harmed by lifting the embargo. For instance, one declarant refers to the harm he will suffer from the final rule "because it contains several inadequacies, which, if enacted, would continue to allow foreign vessels the opportunity to harvest yellowfin tuna at the expense of dolphins in the ETP." *See* Declaration of Christopher Croft at ¶ 16. Yet, this is exactly what the IDCPA permits by accepting a limit of 5,000 dolphin mortalities. Another declarant states that she "would be devastated if the depleted species of dolphins were to perish from this earth, and feel[s] injured when needless dolphin deaths occur." *See* Declaration of Rina Rodriguez at ¶ 8. However, in discussing injury for standing purposes, the Supreme Court has held that emotional harm is not cognizable. *See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 485 (1982). The final declarant states that he will be harmed because "the regulations in question ensure future dolphin mortality to ETP species that have already been listed as depleted." *See* Declaration of Craig VanNote at ¶ 16. The VanNote and Croft declaration suffer from the same deficiencies.

Finally, Plaintiffs' argument that irreparable injury is presumed in environmental cases is unavailing. Plaintiffs cite to a California district court's statement that unnecessary deaths of marine mammals constitutes irreparable injury. *See Earth Island Inst. v. Mosbacher*, 785 F. Supp. 826, 835 (N.D. Cal. 1992), *vacated sub nom. Earth Island Inst. v. Brown*, 28 F.3d 76 (9th Cir. 1994). This case was decided before the IDCPA's enactment, by a district court in another circuit, and the Ninth Circuit vacated the decision for lack of jurisdiction. Plaintiffs' reliance, therefore, on the statement regarding irreparable injury is misplaced. Furthermore, even if the case represented the controlling law of this circuit, Congress has decided that 5,000 dolphin deaths is currently acceptable. Thus, even if a presumption of irreparable injury exists, Plaintiffs would have to show that the number accepted by Congress was in danger of being exceeded by ending the embargo.[7]

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[7] Likewise, the Court finds Plaintiffs' reliance on *Kokechik Fishermen's Ass'n v. Secretary of Commerce*, 839 F.2d 795 (D.C. Cir. 1988), unpersuasive. The issue in *Kokechik* was whether the Secretary of Commerce erred by issuing a permit allowing incidental takings of one species knowing other protected species not covered by the permit would also be taken. *See Kokechik*, 839 F.2d at 800. The court held the Secretary's issuance of the permit was contrary to the MMPA's requirements. *See id.* at 802. In the present case Congress amended the MMPA to authorize the taking of up to 5,000 dolphins. Thus, the reasoning in *Kokechik* is not applicable to the case in its present posture where Plaintiffs have not produced evidence on the effects of lifting the embargo.

B. Public Interest

In addition to Plaintiffs' failure to produce evidence showing irreparable injury, the Defendants have come forward with evidence demonstrating that if the embargo remains in place, the international agreement will likely fall apart, leaving the dolphins in the EPO with no protection.[8] *See* Declaration of Frank E. Loy at ¶¶ 15, 19; Declaration of David A. Balton at ¶¶ 23–24. At the hearing, Mr. Balton testified to the remarkable success international cooperation has had in reducing dolphin mortalities in the EPO. Mr. Balton testified that access to the United States' market was offered as an incentive to signatory nations of a voluntary regime concluded in 1992, the La Jolla agreement. Between 1992 and 1993, the first year that the La Jolla agreement was in effect, the number of dolphin mortalities fell from 15,550 to 3,716. The number of dolphin mortalities from 1993 to 1999 has remained fairly steady, with the last two years seeing further declines.

The Balton declaration presents particularly compelling evidence of the delicate state of the International Program. Plaintiffs' counsel admitted at the hearing that the international regime, indeed, is fragile, but posited that another ten weeks of continuing the embargo until the merits of the case were resolved would have little negative effect. Mr. Balton flatly rejected this contention in response to a question from the Court on the subject. Mr. Balton stated that it was his belief that any continuation of the embargo once an affirmative determination is made would have a deleterious effect on the continuation of the International Program.

Additionally, the Defendants cite to a number of ongoing efforts to establish international fishery management regimes that could be harmed if an injunction issues. *See* Declaration of Frank E. Loy at ¶ 16–18. Defendants believe that if the embargo remains in place the United States' ability to conduct foreign policy, particularly with respect to establishing environmental regimes, will be damaged. While the Court recognizes this as an important factor in the public interest showing, because of the evidence concerning the International Program presented by Defendants, the Court does not address it further.

C. Balancing the Harms

In light of the findings by the Court on Plaintiffs' lack of evidence concerning irreparable injury and the strong showing by the Defendants concerning the public interest factor, the Court does not address Plaintiffs' ultimate likelihood of success on the merits. *See FMC Corp.*, 3 F.3d at 427; *see also Warner-Lambert, Co. v. United States*, No. 00–01–00001,

[8] While the Defendants' evidence is speculative, Defendants do not bear the burdens of proof or persuasion. Furthermore, as Defendants' counsel aptly stated at the hearing, any evidence addressed to events that will happen in the future is necessarily speculative, thereby making the foundation for the speculation highly relevant. Both declarants are highly competent to speculate on the effects continuing the embargo might have. Mr. Loy is the Under Secretary for Global Affairs at the United States Department of State. In this capacity, Mr. Loy has the principal responsibility to manage the development and implementation of U.S foreign policy regarding global environmental matters. *See* Declaration of Frank E. Loy at ¶ 1. Mr. Balton is the Director of the Office of Marine Conservation at the United States Department of State. In this capacity, Mr. Balton participates in the formulation, development and implementation of U.S. foreign policy concerning the conservation and management of living marine resources. *See* Declaration of David A. Balton at ¶ 1.

2000 WL 364168, at *2 (CIT Apr. 4, 2000). Rather, the Court proceeds directly to a balancing of the harms likely to be suffered by the parties if an injunction issued.

Plaintiffs do not dispute the importance of maintaining the International Program, but argue that an injunction to maintain the embargo until the merits can be resolved will best serve the public interest in protecting dolphins. Defendants strongly disagree. Weighing the likelihood of harm asserted by Defendants against that alleged by the Plaintiffs persuades the Court that issuance of an injunction could cause a great deal more harm than good. The Defendants have provided sufficient evidence that maintenance of a multilateral conservation agreement such as the International Program better serves environmental interests than unilateral measures by the United States. Even though the Defendants cannot with certainty predict that the multilateral agreement in place will dissolve if the Court enjoined the lifting of the embargo, the magnitude of the harm that would be caused cautions against such action. Further, there is no indication that dolphin deaths will stop because the embargo remains in place. In fact, dolphin deaths have occurred throughout the duration of the embargo. As Defendants have pointed out, it was the conclusion of an international regime that led to a precipitous decline and stabilization of dolphin mortalities.

The disagreement, to a certain extent, between the parties is over what action will best protect the dolphins in the EPO. At the hearing, Defendants' counsel expressed his desire to expedite this case to a decision on the merits. The Court agrees that this case should be expedited and will work with the parties to ensure that it proceeds swiftly. Based upon the lack of irreparable injury and the evidence Defendants have presented, the Court finds that the public interest in protecting the environment, and in particular reducing dolphin mortalities in the EPO, is best served if no injunctive relief is granted.

IV. Conclusion

The Court finds that Plaintiffs have failed to show irreparable injury. Furthermore, the Court finds that based on the evidence presented by Defendants on the public interest that the equities weigh against issuing an injunction. The April 14 order denying the Motion for a Temporary Restraining Order and/or Preliminary Injunction is hereby incorporated into this opinion.

(Slip Op. 00–43)

COALITION FOR FAIR ATLANTIC SALMON TRADE, PLAINTIFF *v.* UNITED STATES OF AMERICA, DEFENDANT, AND ASOCIACIÓN DE PRODUCTORES DE SALMÓN Y TRUCHA DE CHILE AG, AND AGUAS CLARAS S.A., DEFENDANT-INTERVENORS

Court No. 98–09–02782

[Defendant's Final Determination sustained in part and remanded in part.]

(Dated April 20, 2000)

Collier, Shannon, Rill & Scott, PLLC, (Michael J. Coursey, and *David C. Smith, Jr.)* for plaintiff Coalition for Fair Atlantic Salmon Trade.

David W. Ogden, Acting Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Lucius B. Lau,* Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice; Office of the Chief Counsel for Import Administration, United States Department of Commerce *(Ann Talbot* and *Stacy J. Ettinger),* of counsel, for defendant.

Arnold & Porter, (Michael T. Shor and *Kevin T. Traskos)* for defendant-intervenors Asociación de Productores de Salmón y Trucha de Chile AG and Aguas Claras S.A.

OPINION

GOLDBERG, *Judge:* In this action, the Court reviews a challenge to the Department of Commerce's ("Commerce") *Notice of Final Determination of Sales at Less Than Fair Value: Fresh Atlantic Salmon From Chile,* 63 Fed. Reg. 31,411 (June 9, 1998) *("Final Determination").*

Plaintiff Coalition for Fair Atlantic Salmon Trade ("FAST") argues that Commerce impermissibly departed from its established practice when it identified Canada, for purposes of calculating normal value ("NV"), as the third country market for Asociación de Productores de Salmón y Trucha de Chile AG and Aguas Claras S.A. ("Aguas Claras"). FAST also argues that Commerce unlawfully applied a constructed export price ("CEP") offset to Aguas Claras's NV.

The Court exercises jurisdiction over this matter pursuant to 28 U.S.C. § 1581(c)(1994). The Court sustains the *Final Determination* in part and remands in part.

I.

BACKGROUND

On July 2, 1997, at the request of FAST, Commerce initiated an antidumping duty investigation to determine whether imports of fresh Atlantic salmon from Chile ("salmon") were being or were likely to be sold in the United States at less-than-fair-value. *See Initiation of Antidumping Duty Investigation: Fresh Atlantic Salmon From Chile,* 62 Fed. Reg. 37,027 (July 10, 1997). After determining that it would be impracticable to examine all Chilean producers and exporters of salmon, Commerce decided to limit its investigation to the five largest Chilean exporters. *See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Fresh Atlantic Salmon*

From Chile, 63 Fed. Reg. 2,664, 2,664–66 (Jan. 16, 1998) (*"Preliminary Determination"*). Commerce published its *Final Determination* on June 9, 1998. *See* 63 Fed. Reg. 31,411.

II.

Standard of Review

The Court will sustain Commerce's *Final Determination* if it is supported by substantial evidence on the record and is otherwise in accordance with law. *See* 19 U.S.C. § 1516a(b)(1)(B) (1994).

To determine whether Commerce's interpretation of a statute is in accordance with law, the Court applies the two-prong test set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Chevron* first directs the Court to determine "whether Congress has directly spoken to the precise question at issue." *See id.* at 842. To do so, the Court must look to the statute's text to ascertain "Congress's purpose and intent." *Timex V.I., Inc. v. United States*, ___ Fed. Cir. (T) ___, ___, 157 F.3d 879, 881 (1998) (citing *Chevron*, 467 U.S. at 842–43 & n.9). If the plain language of the statute is not dispositive, the Court must then consider the statute's structure, canons of statutory interpretation, and legislative history. *See id.* at 882 (citing *Dunn v. Commodity Futures Trading Comm'n*, 519 U.S. 465, 470–80 (1997)); *Chevron* 467 U.S. at 859–63; *Oshkosh Truck Corp. v. United States*, 123 F.3d 1477, 1481 (Fed. Cir. 1997)). If, after this analysis, Congress's intent is unambiguous, the Court must give it effect. *See id.*

If the statute is either silent or ambiguous on the question at issue, however, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843 (footnote omitted). Thus, the second prong of the *Chevron* test directs the Court to consider the reasonableness of Commerce's interpretation. *See id.*

III.

Discussion

The Court first considers FAST's argument that Commerce's determination was not in accordance with law because Commerce failed to follow agency precedent. The Court rejects this argument. The Court then considers FAST's claim that Commerce unlawfully applied a CEP offset and finds that Commerce's application of the CEP offset was not in accordance with law.

A. *Flowers Did Not Establish a Prior Norm Commerce Was Required to Follow.*

Under U.S. antidumping law, Commerce determines dumping margins by comparing "the weighted average of the normal values to the weighted average of the export prices (and constructed export prices) for comparable merchandise." *See* 19 U.S.C. §§1673(1), 1677f-1(d)(A)(i)(1994). Normal value is either the price at which the subject merchandise is sold in the exporting country, or under certain

market circumstances, the price at which the merchandise is sold in a representative third-country market. *See* 19 U.S.C. § 1677b(a)(1)(3) (1994). In the *Final Determination,* Commerce concluded that Aguas Claras's NV should be based on its sales of salmon to Canada. *See* 63 Fed. Reg. 31,419–20.

The statutory requirements for Commerce's selection of a third-country NV are that:

> (I) Such price is representative,
>
> (II) The aggregate quantity (or, if quantity is not appropriate, value) of the foreign like product sold by the exporter or producer in such other country is 5 percent or more of the aggregate quantity (or value) of the subject merchandise sold in the United States or for export to the United States, and
>
> (III) The administrating authority does not determine that the particular market situation in such other country prevents a proper comparison with the export price or constructed export price.

19 U.S.C. § 1677b(a)(1)(B)(ii). Commerce found in the *Final Determination* that the Canadian market fulfilled these requirements. *See* 63 Fed. Reg. at 31,420.

FAST argues that Commerce improperly selected Canada as Aguas Claras's third-country NV market. *See* Initial Brief of Plantiff Coalition for Fair Atlantic Salmon Trade in Support of Rule 56.2 Motion for Judgment on the Agency Record ("FAST's Br."), at 13–23; Reply Brief of Plaintiff, The Coalition for Fair Atlantic Salmon Trade, in Support of its Rule 56.2 Motion for Judgment on the Agency Record ("FAST's Reply Br."), at 1–13. FAST reasons that Commerce was prohibited from selecting Canada as a third-country market because of a "norm" established by *Certain Fresh Cut Flowers from Colombia: Preliminary Results and Partial Termination of Antidumping Duty Administrative Review,* 63 Fed. Reg. 5,354, 5,357 (Feb. 2, 1998)*("Flowers").*

Specifically, FAST claims *Flowers* established a norm that prohibits the selection of a national market for third-country NV purposes where that market is "unimportant." *See* FAST's Br., at 15–16 (citing *Flowers,* 63 Fed. Reg. at 5,357). FAST argues that a market is not "important," or alternatively not "representative,"[1] under *Flowers* if the market imports less than three percent of the subject merchandise exported from the home market. *See id.,* at 16–17; FAST's Reply Br., at 3–4. Because in this case Chilean exports of salmon to Canada were under one percent of the total Chilean exports of salmon, FAST argues that the *Flowers* norm prohibits the selection of Canada as a third-country NV market. *See* FAST's Br., at 17–18.

FAST's argument lacks merit because *Flowers* did not create a prior norm that Commerce is compelled to follow. *See* 63 Fed. Reg. 5,357. The

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[1] In its initial brief, FAST argues that the norm purportedly established by *Flowers* must be used to determine if a market is "important." *See* FAST's Br., at 15–18. In its reply brief, however, FAST argues that the norm requires the market to he "representative." *See* FAST's Reply Br., at 1–8. "Representative" is an existing statutory requirement. *See* 19 U.S.C. § 1677b(a)(1)(B)(ii)(I). However FAST attempts to argue the application of *Flowers*—either as elucidating the statutory term "representative" or as adding an extra-statutory requirement—FAST's argument is that Commerce must follow the norm established by *Flowers.*

law is clear. Agencies must conform to prior norms or explain their reasoning for departing from those norms so that a reviewing court may understand the basis of the agency action. *See, e.g., Atchison, Tojoeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade,* 412 U.S. 800, 808 (1973). Here, however, there was no prior norm to follow. The Court can find no explicit explanation, and FAST fails to offer any, of what is required to establish a prior norm. It is clear to the Court, however, from the plain meaning of the term and from the implicit reasoning in the decisions of this court, that *Flowers* alone cannot establish an agency norm. *See Atchison,* 412 U.S. at 808 ("settled rule" used in relation to prior norm); *Hussey Copper, Ltd. v. United States,* 834 F.Supp. 413, 419 (1999)("traditional methodology" and "normal practice" used in relation to prior norm). The word "norm" connotes consistency over time. *See id.* FAST explicitly concedes that *Flowers* is the first, and only, instance in which Commerce purportedly decided that a market was unimportant or nonrepresentative based on an analysis of the total home market exports compared to third-country market exports. *See* FAST's Reply Br., at 3. Therefore, *Flowers* did not establish a prior norm Commerce was required to follow.[2]

B. *Commerce Improperly Applied the CEP Offset.*

FAST argues that Commerce improperly applied the antidumping statute to determine whether Aguas Claras should receive a CEP offset for Level of Trade ("LOT") differences between the salmon Aguas Claras sold in the United States and the salmon it sold in Canada. *See* FAST's Br., at 23–28. Specifically, FAST argues that Commerce improperly deducted section 772(d) selling expenses *prior* to comparing LOT for purposes of giving a CEP offset. *See id.* at 27.

The Court has previously decided this issue. *See Micron Tech., Inc. v. United States,* 40 F. Supp. 2d 481, 485–86 (1999). In *Micron,* the Court expressly held that Commerce may not deduct CEP selling expenses prior to conducting a LOT analysis because to do so would make the CEP offset automatic. *See id.* at 486 (citing *Borden, Inc. v. United States,* F. Supp. 2d 1221, 1235–42 (1998) (Restani, J.). The Court therefore remands this issue to Commerce for the application of LOT methodology in conformity with *Micron, Borden* and the governing statute. *See Mircon,* 40 F. Supp. 2d at 485–86; *Borden,* 4 F. Supp. 2d at 1240–42.

IV.

CONCLUSION

For all of the foregoing reasons, the Court sustains the part of the *Final Determination* pertaining to Commerce's selection of Aguas Claras's third-country NV and remands to Commerce the part of the *Final Determination* pertaining to Aguas Claras's CEP offset. A separate order will be entered accordingly.

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[2] Moreover, even if *Flowers* established a "norm," it is questionable whether it could be considered a "*prior* norm" because the Final Results in *Flowers,* was published one day after the *Final Determination* in this case. *See* 63 Fed. Reg. 31,417. FAST argues that Commerce's Amended Final Determination was published on July 30, 1998, and therefore post-dates *Flowers.* Especially given the fact that no norm exists, the Court is not persuaded by that technicality.

(Slip Op. 00–44)

TORRINGTON CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND SKF USA INC. AND SKF GMBH, DEFENDANT-INTERVENORS

Court No. 98–07–02530

Plaintiff, The Torrington Company ("Torrington"), moves pursuant to USCIT R. 56.2 for judgment upon the agency record challenging one aspect of the Department of Commerce, International Trade Administration's ("Commerce") final determination, entitled *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews ("Final Results")*, 63 Fed. Reg. 33,320 (June 18, 1998). Defendant-intervenors, SKF USA Inc. and SKF GmbH (collectively "SKF"), oppose Torrington's motion.

Specifically, Torrington claims that Commerce erred in accepting SKF's home market support rebates because they were not tied to specific transactions. SKF contends that Commerce acted lawfully in accepting its rebates.

Held: Torrington's motion is denied. Case dismissed.

(Dated April 19, 2000)

Stewart and Stewart (Terence P. Stewart, Wesley K. Caine, Geert De Prest and *Lane S. Hurewitz)* for Torrington.

David W. Ogden, Acting Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Velta A. Melnbrencis*, Assistant Director); of counsel: *Thomas H. Fine*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, for the United States.

Steptoe & Johnson LLP (Herbert C. Shelley and *Alice A. Kipel)* for SKF.

OPINION

TSOUCALAS, *Senior Judge:* Plaintiff, The Torrington Company ("Torrington"), moves pursuant to USCIT R. 56.2 for judgment upon the agency record challenging one aspect of the Department of Commerce, International Trade Administration's ("Commerce") final determination, entitled *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews ("Final Results")*, 63 Fed. Reg. 33,320 (June 18, 1998). Defendant-intervenors, SKF USA Inc. and SKF GmbH (collectively "SKF"), oppose Torrington's motion.

Specifically, Torrington claims that Commerce erred in accepting SKF's home market support rebates because they were not tied to specific transactions. SKF contends that Commerce acted lawfully in accepting its rebates.

BACKGROUND

This case concerns the eighth review of the antidumping duty order on antifriction bearings (other than tapered roller bearings) and parts thereof ("AFBs") imported to the United States during the review peri-

od of May 1, 1996 through April 30, 1997.[1] Commerce published the preliminary results of the subject review on February 9, 1998. *See Antifriction Bearings (Other Than Tapered Roller Bearings) And Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom*, 63 Fed. Reg. 6512. Commerce published the *Final Results* on June 18, 1998. *See* 63 Fed. Reg. at 33,320.

JURISDICTION

The Court has jurisdiction over this matter pursuant to 19 U.S.C. § 1516a(a) (1994) and 28 U.S.C. § 1581(c) (1994).

STANDARD OF REVIEW

The Court will uphold Commerce's final determination in an antidumping administrative review unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (1994).

DISCUSSION

I. *SKF's Home Market Support Rebates*

SKF made home market support rebate payments ("rebates" or "rebate 2") to certain of its distributors/dealers "'to ensure that the distributor/dealer obtains a minimum profit level on sales to selected customers.'" Pl.'s Mem. Supp. Mot. J. Agency R. at 3 (quoting SKF Sec. B QR (Sept. 5, 1996), AR Doc. 42 (GER) at 33). Rebate 2 is an after-market support rebate, granted on a customer-specific basis to SKF's customers, that is, the distributors/dealers, which guarantees the distributors/dealers a certain return on sales of SKF products to the distributors/dealers' customers. *See* SKF's Resp. to Pl.'s Mem. Supp. Mot. J. Agency R. at 28 (quoting Commerce SKF Home Market Verification Report (Dec. 12, 1997), AR Doc. 60 (GER) at 8). The distributors/dealers' minimum profit level is agreed to in advance by SKF GmbH and the distributors/dealers submit the "'invoices that they had presented to their customers as support for rebate 2 payments.'" *Id.* The quarterly produced rebate 2 payments are then calculated by taking "'the difference between the guaranteed return and the actual return on the sale by the distributor/[dealer].'" *Id.* "'To arrive at the factor to be applied against each sale, SKF divided the total amount of rebate 2 payments on a customer-specific basis by total sales on a customer-specific basis.'" Pl.'s Mem. Supp. Mot. J. Agency R. at 5 (quoting Commerce SKF Home Market Verification Report (Dec. 12, 1997), AR Doc. 60 (GER) at 8).

II. *Contentions of the Parties*

A. Torrington's Contentions

Torrington contends that Commerce's acceptance of SKF's rebate 2 as a direct price adjustment was unlawful and/or unsupported by sub-

[1] Since the administrative review at issue was initiated after December 31, 1994, the applicable law is the antidumping statute as amended by the Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994) (effective January 1, 1995) ("URAA"). *See Torrington Co. v. United States*, 68 F.3d 1347, 1352 (Fed. Cir. 1995) (citing URAA § 291(a)(2), (b) (noting effective date of URAA amendments)).

stantial evidence because it was "not tied to specific transactions." Pl.'s Mem. Supp. Mot. J. Agency R. at 2. In particular, Torrington asserts that reported rebate 2 was diluted because it was allocated evenly over all sales to the distributors/dealers, not only to the sales that were related to the rebate. *See id.* at 15.

Torrington further contends that SKF's allocation method runs afoul of the United States Court of Appeals for the Federal Circuit's ("CAFC") rationale in *Torrington Co. v. United States* ("*Torrington CAFC*"), 82 F. 3d 1039 (Fed. Cir. 1996), because SKF "failed to show that all reported rebate amounts directly related to the particular products to which the payments actually related." *Id.* at 2. Torrington argues that *Torrington CAFC* followed prior CAFC cases to define "direct adjustments to price [as] * * * expenses which vary with the quantity sold * * * or that are related to a particular sale." *Id.* at 7 (citations omitted). Torrington asserts that Commerce had properly followed the CAFC's approach in the fifth administrative review, stating that the proper approach is to accept claims for rebates "'as direct adjustments to price if actual amounts are reported for each transaction [and] * * * [accept] adjustments based on allocations [only if] * * * they are based on a fixed and constant percentage of sales price.'" Pl.'s Mem. Supp. Mot. J. Agency R. at 8 (quoting *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Singapore, Sweden, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews* ("fifth administrative review"), 61 Fed. Reg. 66,472, 66,498 (Dec. 17, 1996)).

Torrington claims that in the *Final Results*, however, Commerce "abandoned" its prior approach and the approach taken by the CAFC. *See id.* at 9. As a result, Commerce unlawfully redefined what it considered "direct" by adopting a new methodology. *See id.* According to Torrington, Commerce's new methodology allowed SKF to report allocated post-sale price adjustments ("PSPAs") if SKF acted to the best of its ability in view of its record keeping system and the results were not unreasonably distortive. *See id.* Relying on *Lechmere, Inc. v. Nat'l Labor Relations Bd.*, 502 U.S. 527 (1992), Torrington asserts that Commerce's new methodology is unlawful since it ignores the well-settled definition of "direct" adjustments to price enunciated by the CAFC. *See id.* at 9–10. Torrington further contends that although the fifth administrative review and *Torrington CAFC* pre-date the Uruguay Round Agreements Act ("URAA") amendments, "[t]he new statute retains the distinction between 'direct' and 'indirect' expenses and Congress gave no indication that changes in meaning were ever intended." *Id.* at 11. Therefore, Torrington argues that since Commerce's new methodology must conform with precedent, this Court should review the rebate 2 adjustments by applying the rationale of *Torrington CAFC*. *See* Pl.'s Mem. Supp. Mot. J. Agency R. at 12.

Torrington also asserts that although this Court approved of the methodology used by Commerce in *Timken Co. v. United States* ("*Tim-*

ken"), 22 CIT ____, 16 F. Supp. 2d 1102 (1998), it should reconsider that position because Congress did not intend to change Commerce's policy "of putting the burden of proof with the party who intends to benefit from the claim made." *Id.* at 13. As such, Torrington maintains that even if Commerce's new methodology was applied to the instant case, SKF did not carry its burden of proof. *See id.* at 17. Specifically, SKF did not prove that their allocation was not distortive and that they reported the adjustment "'on as specific a basis as possible.'" *Id.* at 18. Torrington asserts that SKF's allocation of rebate 2 over a large body of sales when it only applied to sales for specified customers was "*a priori* distortive." *Id.* at 19.

Torrington also asserts that SKF did not provide substantial evidence to prove that it used its best efforts to make adjustments "'on as specific a basis as possible.'" Pl.'s Mem. Supp. Mot. J. Agency R. at 19. Rather, Commerce excused specific reporting by SKF on the grounds that rebate 2 could not be reported on a "'transaction-specific basis.'" *Id.* at 20. Torrington also maintains that SKF's argument of infeasibility in undertaking specific reporting is invalid because SKF could have modified its accounting system in order to arrive at more precise data. *See id.* at 20. Therefore, Torrington requests that this Court reverse Commerce's determination under the *Final Results* and remand the case to Commerce to deny SKF's adjustment for rebate 2. *See id.*

B. Commerce's Contentions

Commerce asserts that its acceptance of allocated rebate 2 is supported by substantial record evidence and is in accordance with the law because it is consistent with the URAA, specifically, with 19 U.S.C. § 1677m(e) (1994). *See* Def.'s Mem. Opp'n to Mot. J. Agency R. at 2. Commerce maintains that its modified policy of accepting SKF's allocated rebates as direct price adjustments is consistent with this Court's decision in *Timken*. *See id.* at 5. Commerce argues that *Torrington CAFC* is inapposite to the instant case because it "only held that Commerce is not authorized to grant indirect selling expense treatment to adjustments that are direct selling expenses" and did not "address the question whether Commerce may adjust the home market price by allocated adjustments." *Id.* at 3.

Commerce argues that in *Timken*, this Court laid the premise applicable here, namely, that "'[n]either the pre-URAA nor the newly-amended statutory language imposes standards establishing the circumstances under which Commerce is to grant or deny adjustments to [normal value ("NV")] for PSPAs.'" *Id.* at 10 (quoting *Torrington CAFC*, 82 F.3d at 1048). Commerce argues that the *Timken* court properly "accepted Koyo's PSPAs, even though they were not reported on a transaction-specific basis and even though the allocations Koyo used included rebates on non-scope merchandise." Def.'s Mem. Opp'n to Mot. J. Agency R. at 5.

Commerce argues that its acceptance of rebate 2 was supported by substantial evidence because SKF could not provide information in the

preferred form and that such a determination is consistent with 19 U.S.C. § 1677m(e) and the rationale in *Timken*. *Id.* at 11–12. Commerce reviewed SKF's data to ensure that it was not unreasonably distortive, and it concluded that SKF reported rebate 2 to the best of its ability. *Final Results*, 63 Fed. Reg. at 33,326. Specifically, Commerce maintains that "[b]ecause SKF Germany grants [rebate 2] to distributors/dealers on the basis of their overall sales to the particular distributors/dealer, SKF Germany can not report this rebate on a transaction-specific basis." *Final Results*, 63 Fed. Reg. at 33,326.

Commerce maintains that SKF's reporting the rebate on a customer-specific basis was reasonable. Commerce verified: (1) that rebate 2 was granted on a customer-specific basis; (2) that the rebate 2 allocation was not distorted by out-of-scope merchandise; (3) that no variation existed in the "rebate when it was granted on in-scope or out-of-scope merchandise"; and (4) that "SKF's allocation in this review effectively removed any rebates paid on out-of-scope merchandise from the amount of the actual customer-specific adjustment." Def.'s Mem. Opp'n to Mot. J. Agency R. at 14–15. Arguing against the necessity of requiring transaction-specific reporting, Commerce states that when Congress adopted 19 U.S.C. § 1677m(e), it "cautioned Commerce against an obsession with perfection which results in rejection of reasonable reporting methodologies." *Id.* at 15.

C. SKF's Contentions

SKF supports Commerce's position, asserting that its acceptance of rebate 2 was lawful and supported by substantial evidence. SKF contends that rejecting rebate 2 would be contrary to 19 U.S.C. § 1677m(e) because even if SKF's information does not meet all of Commerce's requirements, the rebate was "timely, verifiable, reliable, [SKF] acted to the best of its ability, and the data can be used without undue difficulties." SKF's Resp. to Pl.'s Mem. Supp. Mot. J. Agency R. at 5–6. Moreover, SKF asserts that in recent decisions involving post-URAA law, "this Court has upheld [Commerce's] treatment of allocated rebates * * * as direct adjustments to price." *Id.* at 5.

SKF maintains that the treatment of allocated rebate 2 as a direct adjustment to price is consistent with *Timken*, which held that 19 U.S.C. § 1677m(e) clearly permits allocated price adjustments. *See id.* at 7. SKF argues that this Court "'approves of Commerce's change in policy, as it substitutes a rigid rule with a more reasonable method that nonetheless ensures that a respondent's information is reliable and verifiable.'" *Id.* at 8 (quoting *Timken*, 16 F. Supp. 2d at 1108).

Furthermore, SKF maintains that it fulfills the requirements of the applicable statute. Specifically, SKF argues that it complied with 19 U.S.C. § 1677m(e) since it submitted rebate 2 data on a timely basis, the information was verified, responses to Commerce's questionnaire were complete and Commerce used the information without difficulty. *Id.* at 11–12.

SKF also maintains that *Torrington CAFC* is inapposite to the present matter because it "neither addresses nor precludes the approach to rebate 2 taken by" Commerce. SKF's Resp. to Pl.'s Mem. Supp. Mot. J. Agency R. at 15. SKF further contends that "the current law, which is different from that which was before the Federal Circuit in *Torrington CAFC*, addresses the issue of allocations and is highly relevant to assessing the lawfulness of [Commerce's] actions in the subject review." *Id.* at 18. Contrary to Torrington's contentions, SKF maintains that its allocations were not distortive and that Commerce's finding that SKF reported the data on as specific a basis as possible was correct. *See id.* at 26 (quoting *Final Results*, 63 Fed. Reg. at 33,326).

SKF also contends that "'[t]o verify the accuracy of the claim of payments, [Commerce] examined the customer-specific quarterly summary of rebate 2 entitlements and actual rebate amounts paid.'" *Id.* at 28 (citation omitted). Commerce "verified that rebate 2 is granted on a customer-specific basis, * * * calculated on a customer-specific basis, and that it is paid on a customer-specific basis." *Id.*

III. *Analysis*

As a preliminary matter, the Court notes that *Timken* is directly applicable here.[2] In *Timken*, this Court upheld Commerce's decision to accept Koyo Seiko Co.'s ("Koyo") billing adjustments and rebates, "even though they were not reported on a transaction-specific basis and even though the allocations Koyo used included rebates on non-scope merchandise." *Timken*, 16 F. Supp. 2d at 1106. Similarly, the Court is faced with the decision whether to uphold Commerce's acceptance of rebate 2, even though it was not reported on a transaction-specific basis and even though the allocations SKF used included rebates on non-scope merchandise.

The Court notes here, as it did in *Timken*, that "[n]either the pre-URAA nor the newly-amended statutory language imposes standards establishing the circumstances under which Commerce is to grant or deny adjustments" to NV for PSPAs such as rebate 2. *See id.* at 1108. Section 1677m(e), however, directs as follows:

> [Commerce] shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements * * * if—
>
> (1) the information is submitted by the deadline established for its submission,
>
> (2) the information can be verified,
>
> (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,

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[2] The Court further notes that *Torrington Co. v. United States*, 82 F.3d 1039 (Fed. Cir. 1996) ("*Torrington CAFC*") is inapposite. Commerce correctly noted that *Torrington CAFC* merely held that Commerce could not treat direct selling adjustments as indirect selling expenses and that it did not address the issue presently before the Court, that is, whether Commerce could use allocated adjustments to adjust the home market price. *See Torrington CAFC*, 82 F.3d at 1051. Additionally, *Torrington CAFC* was decided under pre-URAA law.

> (4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by [Commerce] * * * and
> (5) the information can be used without undue difficulties.

19 U.S.C. § 1677m(e).

The Court finds that Commerce's decision to accept rebate 2 was supported by substantial evidence and otherwise in accordance with law. First, the *Final Results* demonstrate that the elements of § 1677m(e) were satisfied. There is no evidence that the information was untimely. Commerce verified the information. *See Final Results*, 63 Fed. Reg. at 33,326. There is no evidence that the information was so incomplete that it could not serve as a basis for reaching a determination. The Court agrees with Commerce's conclusion that SKF demonstrated that it acted to the best of its ability in providing the information and meeting the applicable requirements. SKF was not able to report rebate 2 on a transaction-specific basis because it grants the rebates to its distributors/dealers on the basis of total sales to the distributors/dealers. *See id.* Thus, SKF had acted to the best of its ability. Finally, the last element of § 1677m(e) is satisfied since there is no indication that the information was incapable of being used without undue difficulties.

Second, at verification, Commerce found that SKF's allocation methodologies were not unreasonably distortive. *See id.* Specifically, Commerce determined that there was "no information on the record which indicates that the bearings included in SKF Germany's allocation vary significantly in terms of value, physical characteristics, or the manner in which they are sold such that SKF Germany's allocation would result in unreasonably inaccurate or distortive allocations." *Id.*

Third, Commerce's actions were also consistent with the Statement of Administrative Action ("SAA") accompanying the URAA.[3] The Court agrees with Commerce's argument that "given the large number of sales, and the manner in which the rebate is granted, annual customer-specific allocations were reasonable." Def.'s Mem. Opp'n to Mot. J. Agency R. at 15. This is consistent with the SAA directive under § 1677m(e), which provides that Commerce "may take into account the circumstances of the party, including (but not limited to) the party's size, its accounting systems, and computer capabilities." H.R. Doc. No. 103–316, at 865 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4195. Thus, Commerce properly took into account the ability of SKF to report rebate 2 on a basis more specific than customer-specific.

In sum, the Court concludes that Commerce's decision to accept rebate 2 is reasonable and in accordance with law, specifically, with the

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[3] The Statement of Administrative Action ("SAA") represents "an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements." H.R. Doc. 103–316, at 656 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040. "It is the expectation of the Congress that future Administrations will observe and apply the interpretations and commitments set out in this Statement." *Id.*; *see also* 19 U.S.C. § 3512(d) (1994) ("The statement of administrative action approved by the Congress * * * shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application.").

post-URAA statutory language and the SAA. Although Commerce's decision represents a change from pre-URAA policy, the Court reiterates its approval of this change, "as it substitutes a rigid rule with a more reasonable method that nonetheless ensures that a respondent's information is reliable and verifiable." *Timken*, 16 F. Supp. 2d at 1108. Furthermore, Torrington presents no compelling reason why the Court should depart from its decision in *Timken*.

CONCLUSION

Commerce's treatment of rebate 2 is supported by substantial evidence and otherwise in accordance with law. Commerce's determination is affirmed.

Slip Op. 00–45

MITSUBISHI HEAVY INDUSTRIES, LTD., AND TOKYO KIKAI SEISAKUSHO, LTD., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND GOSS GRAPHICS, INC., DEFENDANT-INTERVENOR

Consolidated Court No. 96–10–02292

[Commerce's second remand determination is affirmed.]

(Decided April 26, 2000)

Steptoe & Johnson LLP (Anthony J. LaRocca, Richard O. Cunningham, Eric C. Emerson, Gregory S. McCue) for Plaintiff Mitsubishi Heavy Industries, Ltd.; *Perkins Coie LLP (Yoshihiro Saito, Mark T. Wadsen)*, for Plaintiff Tokyo Kikai Seisakusho, Ltd.

David W. Ogden, Acting Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, *Velta A. Melnbrencis*, Assistant Director, Commercial Litigation Branch, *James H. Holl III*, Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; *Robert J. Heilferty*, Senior Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for Defendants.

Wiley, Rein & Fielding (Charles Owen Verrill, Jr., Alan H. Price, John R. Shane, Timothy C. Brightbill) for Defendant-Intervenor.

OPINION

POGUE, *Judge:* Presently before the Court is the U.S. Department of Commerce's ("Commerce") second remand determination ("Second Remand Determ.") of its antidumping investigation of large newspaper printing presses ("LNPPs") from Japan. The matter first arose when Plaintiffs Mitsubishi Heavy Industries, Ltd. ("MHI") and Tokyo Kikai Seisakusho, Ltd. ("TKS"), respondents in the underlying investigation, and Defendant-Intervenor Goss Graphic Systems, Inc. ("Goss"), petitioner in the underlying investigation, filed separate motions challenging various aspects of Commerce's determination in *Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, From Japan*, 61 Fed. Reg. 38,139 (Dep't Commerce, July 23,

1996)(final determ.)("*Japan Final*"), *amended by*, 61 Fed. Reg. 46,621 (Dep't Commerce, Sept. 4, 1996)(antidumping duty order and amend. to final determ.).[1] The motions were consolidated.

On June 23, 1998, this Court remanded certain aspects of Commerce's determination in *Japan Final*. *See Mitsubishi Heavy Indus., Ltd. v. United States*, 22 CIT ___, 15 F. Supp. 2d 807 (1998)(*"Mitsubishi I"*). On December 21, 1998, Commerce issued its first remand determination ("First Remand Determ."). Because Commerce did not adequately explain its foreign like product determination on remand, the Court again remanded this issue to Commerce for further explanation or reconsideration. *See Mitsubishi Heavy Indus., Ltd. v. United States*, 23 CIT ___, ___, 54 F. Supp. 2d 1183, 1197–98 (1999)(*"Mitsubishi II"*). Commerce issued its second remand determination on August 23, 1999.

STANDARD OF REVIEW

The Court will uphold a Commerce determination in an antidumping investigation unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law[.]" Section 516A(b)(1)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(b)(1)(B)(i)(1994).

DISCUSSION

In making the dumping determination at issue here, Commerce based normal value on constructed value.[2] *See Japan Final* at 38,146. Profit is a component of constructed value. *See* 19 U.S.C. §1677b(e)(2). The statute prescribes four different methods for calculating constructed value profit. *See id.* In *Mitsubishi I*, "Commerce relied on 19 U.S.C. § 1677b(e)(2)(A), which states that [constructed value] profit is to be based upon 'the actual amounts incurred and realized by the specific exporter or producer * * * in connection with the production and sale of a

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[1] The antidumping investigation of LNPPs from Japan was conducted simultaneously with Commerce's investigation of imports of LNPPs from Germany. Issues common to both investigations were discussed in *Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, From Germany*, 61 Fed. Reg. 38,166 (Dep't Commerce, July 23, 1996)(final determ.).

[2] Commerce calculates an antidumping duty by comparing the imported product's price in the United States to its "normal value." The dumping margin is the amount by which the normal value exceeds the U.S. price. *See* 19 U.S.C. § 1673(1994).

Normal value is either the price of the merchandise in the producer's home market or its export price to countries other than the United States. *See* 19 U.S.C. § 1677b(a)(1)(1994). Where Commerce cannot compute the home-market price, Commerce may base normal value on constructed value, *see* 19 U.S.C. § 1677b(a)(4), which is calculated pursuant to § 1677b(e).

In addition, the statute provides that "Commerce may determine that home[–]market sales are inappropriate as a basis for determining normal value if the particular market situation would not permit a proper comparison" with the U.S. sales price. Statement of Administrative Action, H.R. Doc. No. 103–316, 103rd Cong., 2nd Sess. (1994), reprinted in *Uruguay Round Agreements Act, Legislative History*, Vol. VI, at 822 ("SAA")(citing 19 U.S.C. § 1677b(a)(1)(C)(iii)). The statute does not define "particular market situation." *See* 19 U.S.C. § 1677b(a)(1)(C)(iii).

Here, Commerce determined that, although home-market sales of LNPPs were "viable" (i.e., sufficient in volume), the home-market sales prices would not allow a proper comparison with U.S. sales prices because of the "particular market situation." *See Japan Final* 38,146–147. Commerce determined that the particular market situation here was characterized by "(1) a unique demand pattern prevalent in each national market; (2) unique technical specification required for each highly customized LNPP sold; and (3) very low volume of individual LNPP sales in the normal business cycle." Second Remand Determ. at 4 (citing Normal Value Mem. (Conf. Doc. 73)(Nov. 9, 1995) at 3). Therefore, Commerce based normal value on constructed value. Commerce's decision to rely on constructed value was not challenged.

foreign like product * * *.'" 22 CIT at ____, 15 F. Supp. 2d at 828 (quoting 1677b(e)(2)(A))(emphasis added).[3]

TKS argued that Commerce should not have relied on § 1677b(e)(2)(A) because the findings that led Commerce to rely on constructed value rather than home-market prices in calculating normal value constituted evidence that no foreign like product existed in the home market. *See Mitsubishi I*, 22 CIT at ____, 15 F. Supp. 2d at 828–29. Because Commerce did not explain which of the three statutory foreign like product definitions it relied upon in classifying LNPPs sold in the home market as foreign like product, the Court remanded this issue for Commerce's reconsideration. *See id.* at ____, 15 F. Supp. 2d at 829.

In its first remand determination, Commerce explained that it had relied upon the definition of foreign like product at § 1677(16)(C). *See* First Remand Determ. at 17. Commerce did not, however, explain the factual basis for its determination that the LNPPs sold in Japan and the United States could "reasonably be compared" under 19 U.S.C. § 1677(16)(C)(iii). *See Mitsubishi II*, 23 CIT at ____, 54 F. Supp. 2d at 1197.

Instead, Commerce referred to its twenty percent "difmer" guideline.[4] Under the difmer guideline, where the difmer adjustment to nor-

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[3] The statute defines "foreign like product" as,

> [M]erchandise in the first of the following categories in respect of which a determination * * * can be satisfactorily made:
>
> (A) The subject merchandise and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, that merchandise.
>
> (B) Merchandise—
>
> (i) produced in the same country and by the same person as the subject merchandise,
>
> (ii) like that merchandise in component material or materials and in the purposes for which used, and
>
> (iii) approximately equal in commercial value to that merchandise.
>
> (C) Merchandise—
>
> (i) produced in the same country and by the same person and of the same general class or kind as the merchandise which is the subject of the investigation,
>
> (ii) like that merchandise in the purposes for which used, and
>
> (iii) which the administering authority determines may reasonably be compared with that merchandise.

19 U.S.C. § 1677(16)(1994).

[4] The antidumping statute provides for an adjustment to normal value for differences in physical characteristics between the foreign like product and the merchandise exported to the United States. *See* 19 U.S.C. § 1677b(a)(6)(C)(ii). Thus, where the foreign like product is not identical to the subject merchandise, Commerce adjusts normal value for the "difference in cost attributable to the difference in physical characteristics"—the difference in merchandise ("difmer") adjustment. *See* Import Policy Bulletin 92.2 (July 29, 1992)("Policy Bulletin 92.2").

To determine whether there is a reasonable basis for comparing non-identical merchandise, Commerce applies the twenty percent difmer guideline. Commerce's 1992 policy bulletin explains:

> To limit the potential differences in commercial value caused by physical differences, we employ the 20% guideline. If the commercial value of two products is greatly different, then a comparison is not reasonable; the difmer adjustment, being limited to variable manufacturing costs probably cannot fully compensate. * * * When the variable cost difference exceeds 20%, we consider that the probable differences in values of the items to be compared is so large *that they cannot reasonably be compared*. Since the merchandise is not identical, does not have approximately equal commercial value, and has such large differences in commercial value that it cannot reasonably be compared, the merchandise cannot be considered similar under [§ 1677(16)(A), (B), or (C)] of the statute.
>
> * * * * * * * * *
>
> There may be instances in which comparisons may be reasonable even if the diffmer [sic] is in excess of 20% of the cost of manufacture of the U.S. model.
>
> * * * * * * * * *
>
> The 20% guideline is, however[,] a point of departure in the analysis, and cannot be ignored. Any use of comparisons with greater than 20% diffmers [sic] must be explained. * * * Unless we can explain how the comparison remains reasonable, or distortion is minimized, we should not make comparisons when diffmers [sic] exceed 20%. Instead, when there is no other similar merchandise, we should revert to constructed value[.]

Policy Bulletin 92.2 (emphasis added). Thus, where Commerce cannot explain how the comparison remains reasonable, Commerce bases normal value on constructed value, rather than on the home-market price. *See id.*

Continued

mal value exceeds twenty percent, Commerce does not make a finding that the home-market product is reasonably comparable to the exported good, unless it can explain how the comparison is nevertheless reasonable. *See* Policy Bulletin 92.2; *see also Ad Hoc Comm. v. United States*, 19 CIT 1398, 1401, 914 F. Supp. 535, 540 (1995); *NTN Bearing Corp. v. United States*, 19 CIT 1221, 1238–39, 905 F. Supp. 1083, 1097–98 (1995); *Koyo Seiko Co., Ltd. v. United States*, 19 CIT 1085, 1091–92, 898 F. Supp. 915, 921–22 (1995), *aff'd in part, rev'd in part*, 92 F.3d 1162 (Fed. Cir. 1996); *Certain Stainless Steel Cooking Ware From the Republic of Korea*, 58 Fed. Reg. 9,560, 9,561 (Dep't Commerce, Feb. 22, 1993)(final results admin. review)("the Department normally does not consider merchandise to be reasonably comparable if the difmer adjustment is greater than 20 percent of the cost of manufacturing the product sold in the United States"); *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France*, 57 Fed. Reg. 28,360, 28,367 (Dep't Commerce, June 24, 1992)(final results admin. review).

Based on language used by Commerce in its first remand determination, original final determination, and normal value memorandum, it appeared to the Court that Commerce had found that the difmer adjustment exceeded the twenty percent guideline. *See Mitsubishi II*, 23 CIT at ____, 54 F. Supp. 2d at 1196–97 (citing First Remand Determ. at 15; *Japan Final* at 38,146; and Normal Value Mem. (Conf. Doc. 73)(Nov. 9, 1995) at 16–17). In maintaining on remand that its foreign like product determination was based on 19 U.S.C. § 1677(16)(C), however, Commerce did not explain the factual basis for its decision that the Japanese and U.S. LNPPs were nevertheless reasonably comparable. *See id.* at ____, 54 F. Supp. 2d at 1197.[5] Therefore, remanding for a second time, the Court ordered Commerce to either explain how the merchandise could still "reasonably be compared" under 19 U.S.C. § 1677(16)(C)(iii) or find that no foreign like product exists. *See Mitsubishi II*, 23 CIT at ____, 54 F. Supp. 2d at 1197–98.

Now, in its second remand determination, Commerce clarifies that it did not in fact conduct a difmer analysis, "notwithstanding the agency's determination that price-to-price [(i.e., normal value to U.S. price)] comparisons between sales of Japanese and U.S. LNPP were not appropriate." Second Remand Determ. at 1. Instead, Commerce determined that it would "not be practicable" to apply the difmer adjustment to normal value. *Id.* at 4 (citing Normal Value Mem. (Conf. Doc. 73)(Nov.

Commerce has consistently applied the twenty percent difmer guideline as prescribed by its 1992 policy bulletin. *See, e.g., Mechanical Transfer Presses From Japan*, 65 Fed. Reg. 11,764, 11,765 (Dep't Commerce, Mar. 6, 2000)(prelim. results admin. review); *Certain Pasta From Italy*, 64 Fed. Reg. 6,615, 6,626 (Dep't Commerce, Feb. 10, 1999)(final results admin. review)("Although the 20 percent difmer test is not mandated by the statute, the Department has used it continuously for a long period of time and in 1992 established a clear policy on its use.")(citing Policy Bulletin 92.2); *Certain Welded Carbon Steel Pipe and Tube From Turkey*, 61 Fed. Reg. 69,067, 69,076 (Dep't Commerce, Dec. 31, 1996)(final results admin. review).

[5] In its first remand, Commerce cited various record documents as support for its foreign like product determination, but none indicated that the home-market and U.S. LNPPs were reasonably comparable in terms of their physical characteristics. *See Mitsubishi II* at ___, 54 F. Supp. 2d at 1197. Instead, each document merely referred to a putative foreign like product, without discussing the factual support for the decision. *See id.*

9, 1995) at 16–17).[6] Commerce explains that its "reference to its 'difmer' practice [in the first remand determination] was by way of background and was not intended to suggest that [Commerce] made a determination in this case that the difmer adjustment would exceed the 20 percent guideline." *Id.* Because Commerce did not in fact find that the difmer adjustment exceeded twenty percent, Commerce did not make a presumptive finding that the Japanese and U.S. LNPPs were not reasonably comparable.

In addition, Commerce posits in its second remand determination that the "reasonably comparable" prong of the foreign like product definition, 19 U.S.C. § 1677(16)(C)(iii), must be interpreted within the context of the statutory provision to which it is being applied. *See id.* at 5. In other words, Commerce suggests that a finding that the difmer adjustment to normal value would exceed twenty percent for particular merchandise does not mean that that merchandise is presumptively not reasonably comparable for the purposes of other sections of the antidumping statute requiring a "foreign like product" (such as, viability under 19 U.S.C. § 1677b(a)(1)(C) and the calculation of constructed value profit under 19 U.S.C. § 1677b(e)(2)(A)).

The Court recognizes that Congress delegated to Commerce the authority to determine whether merchandise may reasonably be compared pursuant to 19 U.S.C. § 1677(16)(C)(iii). Moreover, we recognize that Commerce's practice is to apply the twenty percent difmer guideline solely to determine whether price-to-price comparisons are feasible. *See* Policy Bulletin 92.2.

Nevertheless, the Court declines to decide whether it is permissible to interpret the language "may reasonably be compared" differently depending on which specific provision of the antidumping statute is implicated. First, it seems unnecessary because in this case Commerce did not in fact find that the difmer adjustment would exceed twenty percent. Second, Commerce's twenty percent difmer guideline is flexible, allowing Commerce to find that merchandise is reasonably comparable even where the difmer adjustment exceeds twenty percent. *See* Policy Bulletin 92.2. Finally, to so hold could lead to the awkward result of allowing Commerce to determine that a "foreign like product" exists for the purposes of one part of the antidumping statute but not for another within the same investigation. "The Court presumes that the same words used twice in the same act have the same meaning." *Floral Trade Council v. United States*, 23 CIT ___, ___, 41 F. Supp. 2d 319, 331 (1999)(citing *ICC Indus., Inc. v. United States*, 812 F.2d 694, 700 (Fed. Cir. 1987)).

The larger point is simply that, when, as here, Commerce's foreign like product determination under 19 U.S.C. § 1677(16)(C) is at issue,

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[6] In its normal value memorandum, Commerce concluded: "The sheer extent of the physical differences demonstrate that the [petitioner's] proposed matches are between products separated by complex physical differences so numerous that [Commerce's] normal reliance on [difmer] adjustments would become an analytical exercise equivalent to the use of constructed value." Normal Value Mem. (Conf. Doc. 73)(Nov. 9, 1995) at 16–17.

Commerce must explain the basis for its finding that the home-market and U.S. product may reasonably be compared.[7]

In its second remand determination, Commerce now explains the factual basis for its foreign like product determination. According to Commerce,

> TKS's home[–]market LNPP may reasonably be compared to its sales of LNPP in the United States based on evidence that LNPP in both markets share detailed product characteristics, even if the custom-made combination of precise specifications [made] price-to-price comparisons [(i.e., the use of the home[–]market price as the basis for normal value)] impracticable.

Id. at 2. Commerce further explains,

> [E]vidence submitted throughout the course of the underlying proceeding by both TKS and MHI supports [Commerce's] position. In its questionnaire, [Commerce] requested that both respondents identify LNPP sold in both Japan and the United States using the same detailed set of press characteristics. * * * In their responses, both MHI and TKS indicated that the LNPP sold in Japan and the LNPP sold in the United States share[d] the detailed press characteristics that [Commerce] set out in its questionnaire.

Id. at 11 (citing Aug. 28, 1995, Commerce Questionnaire (Pub. Rec. 72) Sec. A at A–4 to A–6; MHI Oct. 17, 1995, Resp. (Pub. Rec. 176) Sec. A at 11–12; TKS Oct. 17, 1995, Resp. (Conf. Rec. 38) Sec. A at A–3 to A–5; TKS Sept. 28, 1995, Resp. (Pub. Rec. 119), Sec. A at A–24).

MHI argues that the record evidence cited by Commerce actually disproves a finding of reasonable comparability because the parties' questionnaire responses indicate that the Japanese and U.S. LNPPs exhibited "significant differences in over *half* of the categories" of enumerated press characteristics. MHI Resp. to Second Remand Determ. at 5. That MHI "can hypothesize a reasonable basis for a contrary determination[, however,] is neither surprising nor persuasive." *Matsushita Elec. Indus. Co. v. United States*, 3 Fed. Cir. (T) 44, 54, 750 F.2d 927, 936 (1984). The possibility of drawing two inconsistent conclusions does not prevent Commerce's finding from being supported by substantial evidence. *See Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966)(citations omitted); *see also Shieldalloy Metallurgical Corp. v. United States*, 21 CIT 929, 932, 975 F. Supp. 361, 364 (1997)("It is not the Court's role * * * to re-weigh the evidence; rather the Court insures that Commerce's determinations are supported by substantial evidence.").

The plain language of the statutory foreign like product definition vests Commerce with considerable discretion in determining whether home-market and U.S. merchandise "may reasonably be compared." 19

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[7] Moreover, the Court does not here reach the question of whether the language "may reasonably be compared" under 19 U.S.C. § 1677(16)(C)(iii) must be interpreted consistently with "permit a proper comparison" under 19 U.S.C. § 1677b(a)(1)(C)(iii). The foreign like product definition at § 1677(16) appears focused on the reasonableness of comparing goods, while the particular market situation provision at § 1677b(a)(1)(C)(iii) appears focused on the reasonableness of comparing prices. *See* SAA at 822.

U.S.C. § 1677(16)(C)(iii)(stating that Commerce determines whether merchandise "may reasonably be compared"). Moreover, a reasonable person could conclude, as did Commerce, that the Japanese LNPPs were reasonably comparable with the LNPPs sold in the United States based on the finding that they shared numerous detailed press characteristics.[8] Therefore, Commerce's determination that the LNPPS sold in Japan and the United States could reasonably be compared is supported by substantial evidence.[9] Accordingly, Commerce properly calculated constructed value profit based on sales of a foreign like product pursuant to 19 U.S.C. § 1677b(e)(2)(A).

CONCLUSION

Because Commerce's foreign like product determination under 19 U.S.C. § 1677(16)(C) is supported by substantial evidence, the Court sustains Commerce's second remand determination. Judgment will be entered accordingly.

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[8] In addition, Commerce explained that the fact that the home-market and U.S. LNPPs shared a common use (i.e., the printing of newspapers) supported its determination that the merchandise was reasonably comparable under 19 U.S.C. § 1677(16)(C)(iii). *See* Second Remand Determ. at 11. It is a canon of statutory construction that "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous[.]" Norman J. Singer, *Sutherland Statutory Construction* § 46.06 at 119 (5th ed. 1992). Basing the reasonable comparability finding on common use appears contrary to the plain language of the statute, as common use is already required under § 1677(16)(C)(ii). *But see U.H.F.C. Co. v. United States*, 916 F.2d 689, 697 (Fed. Cir. 1990)(holding that "substantial evidence support[ed] the conclusion that home[-] market glues regardless of grade 'may reasonably be compared' based on their many 'common uses.'"). Nevertheless, we need not decide this issue because Commerce's finding of shared press characteristics adequately supports its reasonable comparability finding under § 1677(C)(iii).

[9] TKS argues that Commerce's remand explanation of its reasonable comparability argument cannot be sustained because it is a post hoc rationalization. *See* TKS Cmts. on Second Remand Determ. at 5-6. TKS assumes that, because, in its second remand determination, Commerce articulates its shared-press-characteristics reasoning for the first time in these proceedings, its explanation is a post hoc rationalization.

TKS misconstrues the law. Under the correct recitation of the post-hoc rationalization rule, "[T]he courts may not accept appellate counsel's *post hoc* rationalizations for agency action. * * * It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n. v. State Farm*, 463 U.S. 29, 50 (1983). Here, Commerce itself articulated its reasoning for its reasonable comparability finding in its second remand determination. Therefore, Commerce's explanation is not a post hoc rationalization.

(Slip Op. 00–46)

SAVE DOMESTIC OIL, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 99–09–00558

[Plaintiff's motion for supplemental briefing denied.]

(Dated April 26, 2000)

Wiley, Rein & Fielding (Charles Owen Verrill, Jr. and *Timothy C. Brightbill)* for the plaintiff.

David W. Ogden, Acting Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(A. David Lafer* and *Lucius B. Lau);* and Office of Chief Counsel for Import Administration, U.S. Department of Commerce *(Robert J. Heilferty),* of counsel, for the defendant.

White & Case (Carolyn B. Lamm and *David L. Elmont)* for intervenor-defendant Saudi Arabian Oil Company.

Shearman & Sterling (Thomas B. Wilner) for intervenor-defendants Petroleos de Venezuela, S.A. and CITGO Petroleum Corporation.

Barnes, Richardson & Colburn (Robert E. Burke and *Brian F. Walsh* for intervenor-defendant BP Amoco.

MEMORANDUM AND ORDER

AQUILINO, *Judge:* In accordance with the Joint Status Report filed herein by the parties pursuant to CIT Rule 56.2(a), the plaintiff has interposed a motion for judgment upon the record compiled by the International Trade Administration, U.S. Department of Commerce ("ITA") *sub nom. Dismissal of Antidumping and Countervailing Duty Petitions: Certain Crude Petroleum Oil Products From Iraq, Mexico, Saudi Arabia, and Venezuela*, 64 Fed.Reg. 44,480 (Aug. 16, 1999). Included in this submission are papers styled by the plaintiff as Motion for Supplemental Briefing—"following a response from the Department of Energy to Plaintiff's pending Freedom of Information Act ('FOIA') request."

While the briefing schedule agreed upon in the Joint Status Report does not yet call for responses to plaintiff's motion for judgment, the defendant and intervenor-defendants BP Amoco[1], Saudi Arabian Oil Company, and Petroleos de Venezuela, S.A. and CITGO Petroleum Corporation have timely filed papers in opposition to the requested supplemental briefing which, in turn, have led the plaintiff to attempt to file a reply memorandum[2].

Plaintiff's proffered reasons for the requested supplemental briefing are stated to be as follows:

> From the day Save Domestic Oil's petition was filed, Secretary of Energy Richardson made numerous statements of opposition.

[1] This company, and others originally denied leave to intervene herein as parties defendant per *Save Domestic Oil, Inc. v. United States*, 23 CIT ___, Slip Op. 99–108 (Oct. 12, 1999), subsequently persuaded this court to grant them such leave upon renewed motions, alleging, for example, that "failure to include BP Amoco would result in serious prejudice because BP Amoco would not be adequately represented" by intervenor-defendant API Ad Hoc Free Trade Committee or other parties hereto. Consent Motion of BP Amoco to Intervene as a Matter of Right and Points to Support Thereof, second-third pages.

[2] This memorandum will not be received, as the Rules of this Court of International Trade, *prima facie*, do not permit the filing of replies in support of nondispositive motions. *See* Rule 7(d) & (g).

> While Secretary Richardson admitted that he and his department had no formal role in the Title VII investigations, Secretary Richardson nevertheless stated that the "U.S. Government does not support the petitions" and that he was attempting to "fix" the problem.
>
> More than six months ago, Plaintiff properly submitted a FOIA request to the Department of Energy regarding the Secretary's involvement in the Commerce proceeding. This request has not been acted on, in contravention of the FOIA statute. Accordingly, Plaintiff requests in the attached Motion for Supplemental Briefing the right to file additional arguments on this limited issue (with an appropriate opportunity to reply by Defendant) after this FOIA request is answered. * * *[3]

The sole authority offered for this relief is that "supplemental pleadings are well within this Court's discretion, as set forth in Rule 15(d)." Plaintiff's Motion for Supplemental Briefing, second page.

But of course, the plaintiff seeks leave to file more briefing, not *pleadings*, which CIT Rule 7(a) defines to be only a complaint in an action such as this brought pursuant to 28 U.S.C. §1581(c) and specifically states that "[n]o other pleading shall be allowed". *See also* 5 Wright & Miller, Federal Practice §1183, n. 10 (1990)(a brief is not a pleading). On the other hand, even if the plaintiff were moving for leave to amend its complaint, Rule 15(d) provides that, upon the motion of a party,

> the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented.

Assuming the Energy Department responds to plaintiff's FOIA request, such response should be expected to contain information regarding events that occurred before the ITA's dismissal of plaintiff's petition and thus before its complaint was filed herein. That is, plaintiff's instant motion is not in conformity with the chronology contemplated by the rule. *E.g.*, *Intrepid v. Pollock*, 907 F.2d 1125 (Fed.Cir. 1990)(Rule 15(d) authorizes supplementation of a complaint based on later events). *Cf. Saarstahl AG v. United States*, 20 CIT 1413, 949 F.Supp. 863 (1996) (motion for supplemental briefing in conjunction with motion for leave to amend complaint pursuant to Rule 15 denied).

Furthermore, while the Supreme Court's rejection in *Conley v. Gibson*, 355 U.S. 41, 48 (1957), of the concept that pleading in federal court still is "a game of skill in which one misstep by counsel may be decisive to the outcome" cannot be overlooked, neither can the nature of this action be disregarded. As plaintiff's own motion in chief signifies, it seeks judgment upon the ITA's record, such as it may be. In granting this court

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[3] Brief in Support of Plaintiff's Motion for Judgment on the Agency Record, part IV. The plaintiff pleads a ninth cause of action in its complaint, averring in addition to the foregoing:

> 59. If the facts obtained through discovery reveal that Secretary Richardson interfered in the Commerce Department's proceeding in any way, Commerce's determination not to initiate would be arbitrary, capricious and unlawful.

jurisdiction to review this record per 19 U.S.C. § 1516a(a)(1), Congress reported that the

> review of determinations subject to the provisions of subsection (a)(1) would proceed upon the basis of information before the relevant decision-maker at the time the decision was rendered including any information that has been compiled as part of the formal record. The court is not to conduct a trial *de novo* in reviewing such determinations.

S. Rep. No. 249, 96th Cong., 1st Sess. 247–48 (1979). *See, e.g., Sanyo Elec. Co. v. United States*, 23 CIT ___, ___, 86 F.Supp.2d 1232, 1238 (1999); *Kerr-McGee Chem. Corp. v. United States*, 21 CIT 11, 18–19, 955 F.Supp. 1466, 1471–72 (1997); *Neuweg Fertigung GmbH v. United States*, 16 CIT 724, 726, 797 F.Supp. 1020, 1022 (1992):

> The case law of this court is very clear that the administrative record "is limited to the information that was presented to or obtained by the agency making the determination during the particular * * * proceeding for which section 1516 authorizes judicial review"[,]

quoting from *Beker Indus. Corp. v. United States*, 7 CIT 313, 316 (1984); *Cabot Corp. v. United States*, 11 CIT 447, 449, 664 F.Supp. 525, 526 (1987) ("Congress intended to limit the scope of the record for review to those matters considered in the particular determination challenged").

As with many rules, certain, limited exceptions have been made. Most notably, "[m]aterials outside the administrative record may be discovered * * * where the party requesting discovery makes a *strong showing* of bad faith or improper behavior on the part of the officials who made the determination." *Saha Thai Steel Pipe Co. v. United States*, 11 CIT 257, 259, 661 F.Supp. 1198, 1201 (1987) (emphasis in original), citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). *See also Sanyo Elec. Co. v. United States, supra*; *Ammex, Inc. v. United States*, 23 CIT ___, ___, 62 F.Supp.2d 1148, 1166 (1999) (only upon showing of bad faith or improper behavior should courts allow a party to go behind the stated rationale of agency decisionmakers to conduct discovery concerning what may have been the "real" motives or considerations that led to a particular conclusion); *F.lli De Cecco di Filippo Fara San Martino S.P.A. v. United States*, 21 CIT 1124, 1126, 980 F.Supp. 485, 487 (1997). *Cf. NEC Corp. v. U.S. Dep't of Commerce*, 21 CIT 198, 205–06, 958 F.Supp. 624, 632 (1997)(where no administrative record or formal findings exist, a strong showing of bad faith is not required before discovery can be granted).

While the plaintiff may have hoped to uncover that kind of negative influence through its FOIA request to the Department of Energy[4], this court is not at liberty to grant any relief upon such hope alone. Hence, even though evidence of "unlawful political suasion * * * is seldom highlighted on dog-earred pages of the administrative record"[5], plaintiff's Motion for Supplemental Briefing must be, and it hereby is, denied.

(Slip Op. 00–47)

THAI PINEAPPLE CANNING INDUSTRY CORP., LTD., AND MITSUBISHI INTERNATIONAL CORP., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND MAUI PINEAPPLE CO., LTD., AND INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, DEFENDANT-INTERVENORS

Court No. 98–03–00487

[ITA remand results affirmed.]

(Dated April 27, 2000)

Dickstein Shapiro Morin & Oshinsky LLP (Arthur J. Lafave III, Douglas N. Jacobson and *Patricia M. Steele)* for plaintiffs.

David W. Ogden, Acting Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Lucius B. Lau), Christine E. Savage*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

Collier, Shannon, Rill & Scott, PLLC (Paul C. Rosenthal and *David C. Smith, Jr.)* for defendant-intervenors.

OPINION

RESTANI, *Judge:* Before the court are Commerce's final results pursuant to a second court remand, dated March 10, 2000. *See Final Results of Redetermination Pursuant to Court Remand: Thai Pineapple Canning Industry Corp., Ltd. v. United States, Court No. 98–03–00487* [hereinafter "*Remand Results*"]. The court issued its initial opinion in this case on May 5, 1999, remanding the final results of the Department of Commerce, International Trade Administration ("Commerce" or "the Department") in *Canned Pineapple Fruit from Thailand*, 63 Fed. Reg. 7,392 (Dep't Commerce 1998) (final results of antidumping duty admin. rev.). *See Thai Pineapple Canning Indus. Corp. v. United States*,

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[4] The court notes in passing that FOIA, 5 U.S.C. § 552(a)(4)(B) & (a)(6) (1999), and its pertinent, governing regulation, 10 C.F.R. §1004.5(d)(4) (1999), offer applicants more expeditious resolution thereunder than apparently has been sought by Save Domestic Oil, Inc. Be that as it may, however, this court does not subscribe to the premise that any attempted resort to FOIA in regard to an action such as this is out of bounds. *Compare, e.g.*, Defendant-Intervenor Saudi Arabian Oil Company's Opposition to Plaintiff's Motion for Supplemental Briefing, p. 4 *and* Opposition of Petroleos de Venezuela, S.A. and CITGO Petroleum Corporation to Plaintiff's Motion for Supplemental Briefing, p. 3 *with Star-Kist Foods, Inc. v. United States*, 8 CIT 305, 306, 600 F.Supp. 212, 215 (1984), *and Nat'l Latex Prod. Co. v. United States*, 3 CIT 49, 50 n. 4 (1982).

[5] *Saha Thai Steel Pipe Co. v. United States*, 11 CIT 257, 260, 661 F.Supp. 1198, 1202 (1987).

No. 98–03–00487, 1999 WL 288772 (Ct. Int'l Trade May 5, 1999). The court affirmed the first remand results in part, but reversed Commerce's decision to use contract date as the date of sale for third country sales. The court directed Commerce to recalculate the dumping margin using invoice date for date of sale purposes. *See Thai Pineapple Canning Indus. Corp. v. United States*, No. 98–03–00487, 2000 WL 174986 at * 2 (Ct. Int'l Trade Feb. 10, 2000).

Commerce has now recalculated the dumping margin in accordance with this court's instructions. Plaintiffs, Thai Pineapple Canning Industry Corp., Ltd. and Mitsubishi International Corp., do not contest the revised margin calculation of 14.17 percent. There are therefore no contested issues regarding the margin calculation on remand.

Plaintiffs request that the court order Commerce to instruct Customs to "(1) use the correct importer-specific assessment rates to liquidate entries during the period January 11, 1995 through June 30, 1996; and (2) apply the recalculated weighted-average rate of 14.17 percent to liquidate entries during the period February 13, 1998 through June 30, 1998." Pl.'s Comments on Final Results of Redetermination Pursuant to Court Remand at 2–3. Commerce has already stated that it would "issue appropriate instructions * * * upon the Court's affirmance of these results of redetermination and the lifting of the injunction." *Remand Results* at 2.

The court enjoined liquidation of the relevant entries entered for consumption during the period January 11, 1995 through June 30, 1996, and the period February 13, 1998 through June 30, 1998. *See Thai Pineapple Canning Indus. Corp. v. United States*, No. 98–03–00487 (Ct. Int'l Trade April 21, 1998) (order granting preliminary injunction) and *Thai Pineapple Canning Indus. Corp. v. United States*, No. 98–03–00487 (Ct. Int'l Trade August 18, 1998) (order granting preliminary injunction). Both orders noted that the entries would be liquidated in accordance with the court's final decision, pursuant to 19 U.S.C. § 1516a(e) (1994). Section 1516a(e) provides that entries which have been enjoined by the court pursuant to a request for preliminary injunction, "shall be liquidated in accordance with the final court decision in the action."

Because the entries have yet to be liquidated, there is no "actual injury" for the court to address, and the court is only empowered to decide live cases or controversies. *See Verson, a Div. of Allied Prods. Corp. v. United States*, 5 F. Supp.2d 963, 966 (Ct. Int'l Trade 1998) (court does not have power "to render an advisory opinion on a question simply because [it] may have to face the same question in the future") (citation omitted). The court will not presume that Commerce will fail to comply with this court's orders, but rather presumes that the entries will be liquidated in accordance with 19 U.S.C. § 1516a(e). Therefore the court need not issue an order as requested by plaintiffs at this time.

Accordingly, the court affirms the *Remand Results* addressed herein.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C00/32 4/14/00 Aquilino, J.	Frontier Insurance Company	96-06-01572, 96-06-01594, 96-06-01595	8712.00.35 11%	8712.00.25 5.5%	Agreed statement of facts	Houston, TX Bicycles from Taiwan
C00/33 4/26/00 Aquilino, J.	Alcan Aluminum Corp.	95-06-00805	7601.20.90 Free of duty with merchandise processing fee for goods not originating in the territory of Canada	CA7601.20.90 Free of duty at lower merchandise processing fee and entitled to preferential treatment under the US-Canada Free Trade Agreement	Alcan Corp. *v.* U.S., 165 F.3d 898 (1999)	Various ports Aluminum in various forms and shapes
C00/34 4/28/00 Aquilino, J.	Alcan Aluminum Corp.	95-11-01520	7601.20.90 Free of duty with merchandise processing fee for goods not originating in the territory of Canada	CA7601.20.90 Free of duty at lower merchandise processing fee and entitled to preferential treatment under the US-Canada Free Trade Agreement	Alcan Corp. *v.* U.S., 165 F.3d 898 (1999)	Detroit and Port Huron Aluminum in various forms and shapes
C00/35 5/3/00 Goldberg, J.	Claremont Flock Corp.	97-10-01750	5501.10.00 9.2%	5501.10.00 With duty on the value of the alterations 9.2% in accordance with the provisions of 9802.00.50 and Subchapter II, U.S. Note 32, HTSUS	Agreed statement of facts	Boston Tow nylon "Antron"
C00/36 5/9/00 Aquilino, J.	A.W. Imported Auto Parts, Inc.	96-02-00584	8482.10.50 11% plus antidumping duties assessed at the rate of 155.57% pursuant to Antidumping Investigation #A-475-201	8483.50.8080 Not subject to the assessment of antidumping duties	Agreed statement of facts	New York (Newark) Tensioner pulleys (bearings)

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